Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MONICA LYNN COLEMAN
AND
COLEMAN CRATEN, LLC,
Petitioners

v.

LORI SIMPSON

On Petition For Writ Of Certiorari To The
U.S. Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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81 pp

QUESTIONS PRESENTED

The petitioner asks the Court to consider:

I. Whether bankruptcy trustees should be allowed to conduct searches and seizures without a court order.

II. Whether bankruptcy trustees may waive Constitutional rights and privileges of a debtor without statutory authority.

III. Whether the "wide discretion" ruling replaces the strict liability standard when a trustee violates Bankruptcy statute.

IV. Whether a bankruptcy trustee may be granted immunity for actions taken outside of bankruptcy statutes.

V. Whether the ruling Courts in this case need direction in applying statute and case law.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE STATEMENT

Petitioners have no parent corporation and no publicly-held company owns 10 percent or more of petitioners' stock.

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The opinions of the courts that reviewed the merits appear in the Appendix to the petition and are unpublished.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1). This petition arises from an opinion entered by the U.S. Court of Appeals for the Fourth Circuit on March 27, 2002, case no. 01-2186.

CONSTITUTIONAL PROVISIONS

Fourth Amendment to the U.S. Constitution:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the U.S. Constitution:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Summary of the case history:

This is a case in which a debtor (the petitioner) filed Chapter 7 bankruptcy and the Company ("the Company") in which she held part interest filed a Chapter 11 bankruptcy.

The bankruptcy trustee (the respondent), shortly after her assignment as interim trustee, broke into the petitioner's home, searched and seized the home, its contents and surrounding property. She then facilitated an emergency hearing to convert the petitioner's Company from Chapter 11 reorganization to Chapter 7 liquidation. The respondent and others successfully effected the conversion.

The petitioner filed a complaint in adversary proceeding against the respondent for alleged wrongful acts in searching and seizing the home, and in converting the Company's bankruptcy. The Court gave summary judgment to the respondent.

When the case was appealed to the District Court, the Court affirmed the Bankruptcy Court's opinion, although the District Court did not have the designated record which had been lost after it was docketed by the Bankruptcy Court but before it could be docketed by the District Court.

The petitioner appealed to the U.S. Court of Appeals, filing a preliminary memorandum of law—the final memorandum pending the availability of the designated record—and motioned for a formal briefing procedure. The Court of Appeals asserted that they had the designated record, denied the motion for a formal briefing procedure and affirmed the lower court's opinion.

This case can be be considered as involving, on the one hand, the actions of a trustee in administering a bankruptcy and, on the other hand, the adjudication of the case and appeals by the courts.

I. Conduct of the Courts in the Case:

This *Writ* is submitted as a result of an opinion filed by the United States Court of Appeals for the Fourth Circuit on March 27, 2002. The appeal was based in part on the fact that the designated record, which purportedly had been properly transmitted by the United States Bankruptcy Court, had not actually been considered by the District Court in its decision because the record had never been docketed by the

District Court and apparently had been lost.

The designated record, impressibly voluminous and containing key evidence supporting the petitioner's claims, was transmitted to the District Court by Ms. Karen Mitchell of the United States Bankruptcy Court on December 29, 2000. Indication of the transmittal is on the docket. Throughout the appeal before the District Court, the petitioner heavily referenced the designated record, both in her briefs and in oral argument. At no time did the District Court indicate that it did not have the record. During oral argument, the Honorable Marvin J. Garbis specifically stated that he had "...read all of the papers...." Previously, a motion to strike the designated record, filed by the respondent, had been denied by the court. Though there was a transmittal on the record, as well as rulings made by the District Court which should have relied on the record, according to Ms. Mary Starr, the case administrator for the District Court, the District Court never actually received the designated record. Therefore, it could not have been considered by the District Court in its disposition of the case or in any other ruling. The District Court affirmed (AP2 at 33) the Bankruptcy court's opinion (AP3 at 39). Thus, the petitioner filed a timely appeal to the United States Court of Appeals for the Fourth Circuit (hereinafter referred to as the "Appellate court").

In an effort of complete the transmittal of relevant documents to the Court of Appeals, the petitioner hand-delivered a letter to the Honorable Marvin J. Garbis requesting that a designee search for the designated record and let the petitioner know the result. (AP4 at 59) The request went unanswered.

Additionally, the petitioner filed a motion with the Appellate court to stay pending resolution of the missing designated record. The petitioner argued that the designated record was a core issue on appeal, as the District Court made an evidentiary ruling that there was no evidence when the evidence was in documents within the lost records that were

properly transmitted. The petitioner pointed out that there had been no indication from the Court that the records were lost even though they were referenced throughout the appellate record. The petitioner argued that the Federal Rules of Appellate Procedure (F.R.A.P.) afforded her the right to have these evidentiary documents included when determining the case. The Appellate court denied the motion to stay as moot, stating that the record had already been transmitted. (AP5 at 61) A call to the clerk of the Appellate court revealed that the designated record submitted to the Bankruptcy Court was not available.

Furthermore, the petitioner filed a motion to file a formal brief. The petitioner's legal premise was that the lost designated record, as well as the respondent's statements on appeal that were inconsistent with the lower court record, were key issues to be considered. The petitioner argued that a formal brief consistent with the F.R.A.P. would mandate a procedural resolution. The request was denied. (AP5 at 61)

Concurrent with these motions, the petitioner filed a *Writ of Mandamus* requesting that the Appellate court order the lower courts to perform their ministerial duty in providing the designated record. The Appellate court denied the *writ* finding it moot as they ruled that the record was ultimately forwarded to them. (AP1 at 31) However, as of the date of the filing of this *Writ of Certiorari*, the petitioner's designated record is still not available. Moreover, the Appellate court never resolved the issue that the District Court made decisions of fact without the appropriate records. Nor did the Appellate court explain upon what jurisdictional grounds they *sua sponte* resolved issues regarding factual evidence.

Petitioner also filed a preliminary memorandum of law with the Appellate court, explaining that it was impossible to file a final memorandum of law consistent with the F.R.A.P., as without the designated record the memorandum would not comply with F.R.A.P. 10(a), 11(a) and 11(b), thereby making it impossible to have a proper appellate review. The petitioner

also argued that the District Court committed reversible error in making an evidentiary ruling where there were missing evidentiary documents that had been properly submitted, particularly without providing notice that they were missing.

Moreover, the petitioner argued that the District Court committed reversible error in making a ruling that the petitioner had not met her burden of proof to move forward because, as the petitioner pointed out, the need for additional proof was not raised by the respondent but *sua sponte* by the Bankruptcy Court in its opinion granting summary judgment to the respondent. The petitioner questioned the Bankruptcy Court's action in raising essential element issues *sua sponte* without giving the petitioner the opportunity to cure the defect.

Finally, the petitioner argued that the District Court had committed reversible error in ruling that the petitioner had not met the burden of proof in showing defalcation because it was inconsistent with the United States Supreme Court's ruling in *Moser vs. Darrow*, 341 U.S. 267, 1951, where this Honorable Court ruled that if a trustee takes actions that are prohibited under bankruptcy law, then a trustee is liable even if there is no defalcation.

The Appellate court (AP1 at 31) found no reversible error in the District Court's decision (AP2 at 33). The court never gave the petitioner an opportunity to examine the record on appeal or to file a final memorandum of law before making its final ruling. It simultaneously ruled that the *writ of mandamus* was moot because the lost record issue had been resolved (AP1 at 31), which examination of the record still leaves in question.

The District Court and the Appellate court have made other rulings arising from the main bankruptcy case. The petitioner had filed a motion for leave to appeal to the District Court from a bankruptcy order denying injunctive relief on improper Rule 2004 examinations being conducted by the trustee of the estate.

The District Court denied the motion for leave to

appeal (AP6 at 62). In its ruling the District Court acknowledged that "[T]he Orders here at issue can be said to involve a controlling question of law in that they are dependent upon the authority of the Bankruptcy Court to permit a Rule 2004 Examination while adversary proceedings are pending. . ." but the District Court refused to accept the interlocutory appeal because in "allowing an interlocutory appeal [it] would serve to delay and or obstruct [trustee's] efforts to ascertain relevant facts." The District Court also challenged the petitioner's standing to challenge the matter and ruled that the pending proceeding rule does not apply if the person being deposed is not a party to, or interested in, any adversary proceeding.

Subsequently, the petitioner filed a timely appeal to the U.S. Court of Appeals for the Fourth Circuit under the "Cohen exception" or "collateral order doctrine" pursuant to *In re Johns-Manville Corp.*, 824 F.2d 176 (2nd Cir. 1987) *citing Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546. The petitioner argued that adversary proceedings "...mandatorily supplant Rule 2004 examinations by triggering the discovery system found in Federal Rules of Civil Procedure on parties involved within adversary proceedings." *Matter of M4 Enterprises, Inc*, 190 B.R. 471 (Bkrtcy.N.D.Ga. 1995) *citing Drexel Burnham Lambert Group, Inc.*, 123 B.R. 702, 711 (Bankr. S.D.N.Y. 1991). The petitioner also cited a Maryland case directly on point where the court held that Rule 2004 examinations may be used only in matters unrelated to adversary proceedings. *In re Szadkowski*, 198 B.R. 140, 141 n. 2,3 (Bkrtcy.D.Md. 1996). Even though the Bankruptcy Court specifically stated that it would allow Rule 2004 examinations even in matters overlapping adversary proceedings, none of the courts stated a reason why they did not apply applicable law in their own jurisdiction. The Appellate court dismissed the case, finding no reversible error. (AP7 at 65) The petitioner's motion for rehearing *en banc* also was denied. (AP8 at 67)

Petitioner also filed an appeal with the Appellate court

on a Fifth Amendment issue in the underlying bankruptcy case, but it was a distinctly separate issue from the Fifth Amendment issue (described below) that is, in part, the subject of this *Writ*. In May, 1999, the respondent insisted on an Emergency Rule 2004 examination of the petitioner. Counsel for the Company attempted to delay based on the petitioner's acquisition of a commitment for a loan to pay all creditors and allow the petitioner to re-establish the business, in which case the petitioner would file a Motion To Dismiss. However, the respondent refused to delay the deposition. Thus, on June 2, 1999, the petitioner dutifully attended an emergency deposition held by the respondent. The respondent asked only a few questions. On June 3, 1999, the respondent filed an Objection To Dismissal with the Bankruptcy Court. In her pleading, the respondent quoted from the deposition, made allegations against the petitioner and stated that a dismissal would be unfair to creditors. The respondent did not include in her document that she knew that the petitioner would file for a dismissal only if and when the money arrived. Nor did she include that the petitioner intended to file only because all creditors would have been paid. In addition, the respondent did not explain in her pleading how it would be unfair to the creditors who would have been paid in full.

The respondent's pleading was filed on June 3, 1999, at 3:50 p.m. The Bankruptcy Court closes at 4:00 p.m. Yet, the next morning, June 4, 1999, in the early morning edition of the *Baltimore Sun*, there was an article using quotations from the document that had been filed by the respondent ten minutes before closing of the Bankruptcy Court. The article cited those parts of the deposition that would sound incriminating to the general public, the petitioner's assertion of the Fifth Amendment Privilege, and the respondent's allegations against the petitioner, including the respondent's statements of how unfair it would be to creditors if the petitioner were to be dismissed. The newspaper article caused the petitioner to lose her backers. Later, as this issue came to the forefront in the courts, the

respondent asserted that her actions were based on her refusal to perpetuate a fraud. However, in deposition, the respondent admitted that at the time she took the actions she was unaware of any of the particulars.

On September 29, 1999, the respondent filed a Notice for continuation of the Rule 2004 examination of the debtor. By this time, there were seven outstanding adversary proceedings, including an adversary proceeding filed by the respondent challenging the dischareability of the debtor.

On November 2, 1999, the petitioner filed an objection to the continuation of the Rule 2004 examinations. In addition to the petitioner's argument that the Bankruptcy Court lacked authority to authorize Rule 2004 examinations on matters overlapping adversary proceedings, the petitioner argued that the respondent was abusing her powers by inappropriately using the 2004 examinations to sway public opinion against the petitioner. The petitioner argued that the respondent was adjudicating her case in the press. The petitioner argued that both the Attorney General and the respondent had acknowledged that they were working integrally together, that they were using the press to incite creditors, which was needed to establish their claims. The petitioner argued that established caselaw specifically prohibited them from using this technique. (*See In re Sawyer*, 360 U.S. 622, 1959; *State v. Cottman Transmission*, 542 A.2d 859 (Md. App. 1988))

On January 18, 2000, the Bankruptcy Court overruled the petitioner's objection to the continuation of the Rule 2004 examination and ordered the petitioner to appear for deposition. Two days later, on January 20, 2000, in open court, the petitioner, believing she was complying with the court order, arranged for a deposition. Later, the Bankruptcy Court ruled that agreeing to the deposition constituted a waiver of the right to object to a Rule 2004 examination.

On March 20 and March 21, 2000, the petitioner attended a deposition. By this time, there were numerous pleadings by the respondent asserting that she was

colloborating with the Attorney General's Office, that there was a convening grand jury, as well as friends of the petitioner who were calling the petitioner with knowledge of people being called to a grand jury. Additionally, the petitioner's husband, who was not even a part of the petitioner's business or bankruptcy, was advised by his attorneys, Piper and Marbury, a well-established Baltimore law firm, to assert the Fifth Amendment Privilege because of what they referred to as a "witch hunt". The petitioner was advised by attorney/friends that anything said, even on seemingly innocuous questions, could not only be used against the petitioner, but could open the door to other questions which could be manipulated. Thus, the *pro se* petitioner asserted the Fifth Amendment Privilege.

Respondent challenged the petitioner's Fifth Amendment Privilege as improper.

A few days after granting the respondent summary judgment in the petitioner's adversary proceeding wherein the ruling was based in part on the petitioner's assertion of the Fifth Amendment privilege, the Bankruptcy Court ruled that the petitioner's assertion was improper and that she must appear before him and answer on a question-by-question basis.

Petitioner filed a motion for leave to appeal before the United States District Court. The Honorable Benson Legg accepted the interlocutory appeal and ruled (AP9 at 68) that the Bankruptcy Court had full authority to set the terms and conditions of a Rule 2004 examination and that the petitioner had waived rights to object by agreeing to attend.

Petitioner then filed an appeal with the United States Court of Appeals for the Fourth Circuit. The Appellate court found no reversible error. (AP10 at 70)

A motion for rehearing *en banc* was denied. (AP11 at 72)

II. The Administration of the Bankruptcy

A. *Introduction*

The adversary proceeding at issue within this *Writ*

calls into question the conduct of a bankruptcy trustee and the law governing her actions.

On September 10, 1999, the petitioner filed a complaint in adversary proceeding alleging that the respondent/Trustee administered the petitioner's bankruptcy estate in violation of applicable bankruptcy law, and by doing so, violated the petitioner's rights under bankruptcy law and the U.S. Constitution, thus destroying the petitioner's business and causing other irreparable harm to the petitioner.

B. *Search and seizure*

Included in the petitioner's claim was an assertion that the respondent conducted an illegal search and seizure.

On May 7, 1999, the petitioner filed a Chapter 7 personal bankruptcy *pro se*. The petitioner's residential address and residential telephone number were on the bankruptcy filing form. On May 11, 1999, a business in which the petitioner was a fifty percent owner, i.e., Coleman Craten, LLC, (the Company) filed a Chapter 11 restructure Bankruptcy through Cornelius J. Carmody, Esquire. There was a reorganization plan whereby the petitioner believed all creditors would have been paid.

On May 11, 1999, the respondent was assigned as the interim trustee of the personal estate only. The petitioner was not aware of the respondent's assignment as trustee prior to the respondent's adverse actions against the petitioner, as the respondent had not contacted the petitioner, nor had she filed notice of her appointment as interim trustee with the court prior to taking adverse action against the petitioner.

On May 13, 1999, the respondent, accompanied by a locksmith, her attorney and an insider who represented an adverse interest to the estate, went to the petitioner's home. None of the parties accompanying the respondent had filed their application for employment with the court at that time. The respondent and those accompanying her broke into the petitioner's home, changed the locks and seized all properties therein, including real and personalty property of the petitioner, of petitioner's husband and of their ten-year-old

son. The respondent did not have an entry order from the court and did not assert exigent circumstances. In fact, on May 17, 1999, the court denied a motion for an entry order. The respondent did not give the petitioner an opportunity to voluntarily surrender assets of her estate. During testimony before the Circuit Court for Baltimore City, the respondent acknowledged that she was aware that the petitioner is given an opportunity under bankruptcy law to voluntarily turn over the assets.

In granting summary judgment to the respondent, the Bankruptcy Court ignored the petitioner's legal argument of an improper search and seizure. Without addressing the method by which the respondent took the property, and without addressing her violation of the debtor's rights, the court ruled that the respondent's actions were within her scope of duty in collecting the assets of the estate.

In its ruling, the court noted that it had relied on the respondent's affidavit. The petitioner had challenged the affidavit, alleging that it included false statements and statements that were inconsistent with court documents filed by the respondent and her agents. The court ignored the challenge. In part through her affidavit, the respondent attempted to establish a basis for immunity. The respondent asserted in her affidavit that the home was "trashed" even though the photographs taken by the respondent's agent belied such an assertion, which was challenged by another court--the Circuit Court for Baltimore City. There, after carefully examining pictures taken in the home, the court ruled that it did not look trashed to him, and that there was insufficient evidence to support abandonment or poor conditions within the home.

The Bankruptcy Court's memorandum opinion mirrored the respondent's inaccurate affidavit, for example stating that at the May 13, 1999, conversion hearing, the respondent reported finding animal waste in the animal cages in the petitioner's home. (AP3 at 40) There is no such statement in the record of the hearing. And although in his

memorandum the Court held that exigent circumstances existed at the May 13 hearing (AP3 at 40), the court had ruled at the hearing that there was insufficient evidence of exigent circumstances (and thus no reason not to delay the proceeding to give the Company's counsel an opportunity to prepare a defense). In his memorandum the Court mentioned the presence of Mrs. Coleman's counsel. Only the Company was represented. The individual petitioner had not been given notice and was not present. All of the evidence found in the petitioner's home, and the status of the Company, could have been easily explained by the individual debtor.

However, both the Bankruptcy Court and the Circuit Court for Baltimore City, relying on the trustee's assertions, found that the search and seizure were proper. The Bankruptcy Court's decision (AP3 at 39) was affirmed on appeal by both the District Court (AP2 at 33) and the Appellate court (AP1 at 31).

C. *Pursuit of an adverse interest to the estate*

1. *The relationship of the parties*

In the petitioner's complaint she argued that the respondent had violated multiple bankruptcy statutes and pursued an adverse interest to the estate. On May 12, 1999, the respondent hired Richard Gray of Financial Conservators, Inc ("Mr. Gray"). Mr. Gray had represented an adverse interest to the estate, i.e., he was assigned by the Circuit Court of Baltimore City for the benefit of James and Carol Hyde ("The Hydes"). The Hydes were not creditors of the estate to which the respondent was assigned, but were attempting to become creditors by asserting wrongdoing by the petitioner while acting as an officer of the Company, in which the petitioner held a fifty-percent ownership. Mr. Hyde, a prominent Baltimore executive of a Fortune 500 company, had arranged a receivership through the Circuit Court for Baltimore City at an emergency *ex parte* hearing. At the request of the Hydes' attorney, Mr. Gray was assigned as a receiver and was in control of both Coleman Craten, LLC, and the Monica Lynn Coleman. Thus, Mr. Gray was an

insider pursuant to 11 U.S.C. § 101(31)(B)(iii).

The Hydes were represented by counsel, Nancy Alquist, Esquire, from a firm (Ballard, Spahr, Andrews & Ingersoll, LLP) that had represented the petitioner and an affiliate company on other financial matters. However, the Bankruptcy Court ruled that representation of the Hydes by Ms Alquist was not improper.

The respondent admitted in deposition that Ms Alquist was a very good friend with whom she had worked for years, and to whom she looked for direction.

2. *The activities of the parties*

On May 12, 1999, the respondent met with the Hydes and Nancy Alquist, at which time the respondent immediately hired Mr. Gray. When the respondent was asked why she hired Mr. Gray, even though it was a violation of 11 U.S.C. § 327 (a) (because he was both an insider and represented an adverse interest), she responded that it was because she thought he was the best man for the job. The respondent also did not comply with the notice requirement associated with 11 U.S.C. § 327(c) to provide notice of employment of a party who represented the interest of a creditor. (*See* also *In re Begun*, 30 C.B.C.2d 833, 162 B.R. 168 (Bankr.N.D.Ill. 1993); *Accord In re Park-Helena Corp.*, 63 F3d 877, 34 C.B.C.2d 429 (9th Cir. 1995), *cert. denied*, 516 U.S. 1049, 116 S.Ct. 712, 133 L.Ed. 2d 667 (1996); *Accord Rome v. Braunstein*, 19 F.3d 54, 30 C.B.C.2d 1346 (1st Cir. 1994)). The respondent did not file notice of the employment of Mr. Gray with the court prior to hiring him, but rather hired Mr. Gray under a *nunc pro tunc* contract. The petitioner asserted Mr. Gray would not have qualified for a *nunc pro tunc* contract under established bankruptcy law. (*See In re Martin*, 102 BR 653, 657 (Bankr. W.D. Tenn. 1989))

On May 13, 1999, the respondent, after seizing the petitioner's home, called Ms Alquist and told her to arrange for an emergency hearing based on exigent circumstances. The purpose of the hearing was to convert the Chapter 11 Company, of which the petitioner was a fifty percent owner,

and to have the respondent assigned as a joint trustee. The petitioner was not given the required notice nor were most of the creditors of either estate . The respondent also had not conducted an investigation of the financial affairs of the debtor prior to taking adverse action based on them, contrary to 11 U.S.C. § 704(4), and is evidenced by a series of misrepresentations to the court on May 13, 1999, by the respondent. Among these were assertions that (1) the affiliate company was a stockbroker; (2) the petitioner was a fifty-one percent owner and therefore, since the petitioner was in personal bankruptcy, the respondent had control of the company as the trustee of the personal estate; (3) the petitioner's partner had withdrawn his partnership interest; (4) the respondent had investigated the financial affairs of the debtor and she would not support a restructure plan (but during deposition acknowledged that she did not conduct an investigation of the financial affairs of the debtor or debtor's corporation, an asset of the Chapter 7 debtor); and (5) the respondent was standing in the shoes of the debtor. However, the respondent did not inform the court that she had not performed the notice requirements or other duties of a debtor-in-possession which, of course, would have been required of a trustee standing in the shoes of a debtor. For example, since the petitioner was not serviced regarding the hearing, the respondent had violated petitioner's rights under 11 U.S.C. §1109(b) (right to be heard) and 11 U.S.C. §1121(c) and (d). The respondent did not disclose her proposed actions to the interested parties in the estate (*See In re Freelander Inc., the Mortg. People*, 95 B.R. 390 (Bkrtcy.E.D.Va. 1989); *see* also *Bennett v Williams*, (1989, CA9 Cal) 892 F.2d 822, 19 BDC 1983 CCH Bankr.L.Rptr. 73131)).

The petitioner also claimed, with evidence presented, that a reasonable jury could have found intentional misrepresentation. The Bankruptcy Court ruled that recovery could not be maintained because of immunity. The court also raised essential element issues *sua sponte* without giving the

petitioner the opportunity to respond. On appeal, the petitioner argued that raising issues *sua sponte* without giving the petitioner an opportunity to respond was inconsistent with the rulings of the U.S. Supreme Court. Additionally, the petitioner argued that immunity did not apply. But the ruling was upheld on appeal (AP1 at 31 and AP2 at 33).

And finally, the respondent argued that the petitioner could not recover because of the petitioner's assertion of the Fifth Amendment Privilege, wherein the respondent asserted the "sword/shield doctrine". The petitioner argued that the sword/shied doctrine did not apply because a *prima facie* case was established in the court records submitted by the respondent and her agents, for which the respondent had copies, and that the petitioner's testimony was not relevant to the proceeding. The petitioner further pointed out that the respondent also refused to supply discovery material to which the petitioner was entitled by asserting attorney/client privilege, as well as refusing to provide seized documents, which the Court did not question. This alone should have been sufficient to preclude summary judgement for the respondent. (*Anderson v. Liberty Lobby, Inc.*,477 U.S. 242, 250, 1985) The Court ruled that the petitioner had asserted the sword/shield doctrine and granted summary judgment to the respondent. It was affirmed on appeal.

Thus, the petitioner filed this *Writ* herein.

WHY THE WRIT SHOULD BE ACCEPTED

I. The petitioner asks whether bankruptcy trustees should be allowed to conduct searches and seizures without a court order.

Specific to the instant case, the petitioner asks whether Bankruptcy Trustees are liable if they conduct a search and seizure without a Court Order prior to filing the Notice of their assignment as Trustee with the Bankruptcy Court, and without providing notice to the debtor or the court, when the search and seizure is conducted within the time-frame in which Bankruptcy law provides that the debtor

has control over the Property which is the subject of the search.

The United States Bankruptcy Court For The District of Maryland, Northern Division, The Honorable E. Stephen Derby presiding, reviewed this issue, both in the original complaint, and in the petitioner's Motion For Summary Judgment. The Court granted summary judgment to the respondent. (AP3 at 39) The District Court affirmed. (AP2 at 33) The United States Court of Appeals for the Fourth Circuit also affirmed the Bankruptcy Court's decision. (AP1 at 31)

The *pro se* petitioner asks this Honorable Court to consider the following for review:

A. *Should Trustees be allowed to conduct searches and seizures? If so, should Trustees be allowed to conduct searches and seizures without a Court Order?*

1. *The plain language of the Bankruptcy Statute does not empower Bankruptcy Trustees to conduct searches and seizures; Bankruptcy Rules dictate that there must be a "proceeding" if debtors do not voluntarily turn over assets.*

The United States Bankruptcy Code does not authorize searches and seizures. Instead, the language clearly indicates an expectation of a "give and take" between the trustee and the debtor. As dictated within the Bankruptcy Code, the debtor is to voluntarily surrender the assets of the estate (11 U.S.C. § 521(4)), and the trustee must "collect" the assets that the debtor is voluntarily surrendering (11 U.S.C. § 704(1)). Moreover, the Trustee is to close the estate "as expeditiously as is compatible with the best interests of parties in interest" (11 U.S.C. § 704(1)). The debtor is considered an interested party in the estate (as established by the Honorable E. Stephen Derby in *In Re Bowman*, 181 B.R. 836, 387 Bkrtcy.D.Md., 1995). Communication with the debtor is required to ascertain "the best interests of the [debtor]." If the debtor refuses to voluntarily surrender the property, there is a Court Proceeding to force the debtor to surrender the assets (U.S.

Bankruptcy Rule 7001(1) (Rule 7001(1) indicates that there is a proceeding, but denotes that it is other than adversary proceeding)).

Furthermore, unlike Police Officers and Inspectors, there is no statutory authority, either federal or state, that empowers a Bankruptcy Trustee to perform searches and seizures. Therefore, debtors have no Notice that they are abdicating their Fourth Amendment Rights under the Constitution by filing a Bankruptcy. As this Honorable Court makes its decision in this case, the petitioner pleads with the Court to consider that most Debtors do not have the resources to defend themselves against such actions, as they may not use pre-petition assets to do so, thereby making it next to impossible for many debtors to defend themselves from any search and seizure abuses.

2. *Bankruptcy Case-law is Inconsistent Amongst the Jurisdictions Regarding this Matter, Resulting in Unequal Protection Under Federal Law.*

It has long been established that court intervention should be sought if a debtor does not voluntarily turnover assets (*Kane v. Smith*, 355 P.2d 827). The *Kane* Court made it clear that a trustee must show by "clear and convincing evidence that the Debtor is not voluntarily complying with turnover requirements". (*Id.* at 831) The court explained that turnover procedures should be used to seize property, and because of the seriousness of this action, the Court should be reluctant to grant such requests (*Id.* at 831). The Court further stressed the need that all parties receive their due process rights, as by the proceeding all parties have notice; are given an opportunity to respond; and all enjoy the privileges of the Court's process, hearings and deliberations (*Id.* at 831).

But in recent years, the law has not been so clear. Whether a Trustee has the right to search and seize properties, with or without a court order, under common law varies amongst the different jurisdictions.

For example, in New York, the Court ruled that the

Trustee's search and seizure was a "technical trespass, but that the evidence could not be suppressed because the Trustee could have legally obtained the documents (*United States v. Masterson*, 383 F.2d 610, 1967). However, the case only involved a suppression issue, not monetary damages for the Trustee's illegal act. The Court of Appeals upheld on other grounds, but indicated that the Trustee's actions were proper because "The Trustee's representatives did no more than a private person could lawfully do under similar circumstances." (*Id.* at 613) But the *United States v. Masterson* ruling is inconsistent with this Honorable Court's ruling that when a person acts under color of federal law regarding Fourth Amendment Rights, the person may not be treated as an ordinary citizen (*Bivens v. Six Unknown Agents*, 403 U.S. 388, 1971).

Alternatively, in Michigan, the Bankruptcy Court has a more strict standardized procedure for searches and seizures by a trustee (*In Re Barman*, 252 B.R. 403, 404 (Bkrtcy.E.D.Mich. 2000)). In *Barman*, the Court ruled that a Trustee may obtain a Court Order to search, but the Trustee must file a written motion requesting the inspection order, filed in accordance with the Court's regular motion process (*Id.* at 404). If a Trustee is seeking *ex parte* relief, a motion must be filed setting forth detailed facts supporting such relief. The inspection should occur during regular business hours, in the presence of the debtor, and without forcible entry (*Id.* at 404). And in the event the Trustee seeks to take actual possession, the Michigan Court requires that the Trustee follow established procedures for such a seizure, which may involve an injunction (*Id.* At 406).

Moreover, after concluding that a Trustee is bound by the Fourth Amendment, the Court goes on to explain why a Debtor does have an expectation of privacy under the Fourth Amendment, albeit diminished (*Id.* At 403, 404). As the Court correctly points out: "nothing in the Bankruptcy Code states or implies an obligation upon a debtor to permit an inspection by a trustee without a court order" (*Id.* at 405).

And the Court further explains why Debtors retain an interest even during the turnover period: "Except in the rare cases in which an objection to exemptions is filed, or in the rare case in which there are non-exempt assets, all estate property revests in Chapter 7 debtor within 50-70 days after filing. (*Id.* at 405). Indeed, in the instant case the respondent did file an objection to exemptions, but they were ultimately returned to the petitioner and the petitioner's spouse, but not before tens of thousands of dollars of assets were stolen while in the respondent's care (as a result of the seizure). The respondent refused to provide insurance information to the petitioner, in violation of 11 U.S.C. § 704(2). The respondent's counsel recently admitted that there was no insurance.

Additionally, in applying the *Barman* ruling in the instant case, the respondent could not have prevailed, as she had no Court Order; she conducted the search when the debtor was not present (in fact there was no one home and neither the Debtor nor the Court was informed of her assignment as Trustee); she used forcible entry, seized without a Court Order, and searched and seized not only debtor's property, but that of her non-debtor spouse and debtor's ten (10) year old son. In *Barman*, the Court had also established that a Trustee is limited to search and seizure rights of Debtor's assets only.

Moreover, the presiding Judge had previously ruled that a Bankruptcy Trustee has a strict duty to make informed decisions and use reasonable diligence in gathering and considering information. (*In re Bowman*, 181 B.R. 836, Bkrtcy.D.Md. 1995) In the case at bar, it was shown that partly due to her haste, the Trustee had misrepresented to the Court the documents that she had found during her search, which resulted in the conversion of the petitioner's business. However, in the instant case, the Bankruptcy Court still ruled that these actions are within the Trustee's scope of duty, and therefore incurs no liability (AP3 at 39). The motion to replace the Trustee, which was submitted three years ago,

remains undecided.

In another Fourth Circuit Case, the Court ruled that a Trustee has the right to waive the debtor's Fourth Amendment Right to be free from an unreasonable search and seizure (*U.S. v. Patrick*, 916 F.Supp. 567, 571-572, 1996), (though, unlike the present case, in *Patrick* the Court ruled that the Trustee had no rights to non-debtors property). Conversely, in Ohio, the Court found that a Trustee had no rights to search and seizure, not even under a Court Order (*Application of Trustee in Bankr. For Search Warrant*, 173 B.R. 341 (N.D. Ohio 1994)). Interestingly enough, the Ohio Court's reasoning is consistent with current law. The Ohio Court based its ruling on the fact that in order to conduct searches and seizures, it must involve criminal activity, which is outside the scope of duty of a Trustee as defined under bankruptcy law. The requirement for criminal activity in searches and seizures is discussed in *U.S. v. Miller*, 24 F.3d 1357 (11th Cir. 1994).

B. *May a Bankruptcy Trustee Waive Constitutional Rights and Privileges in Behalf of a Debtor Without Statutory Authority?*

If this Honorable Court allows the *Patrick* ruling to stand, it proliferates far reaching repercussions. Basically, the *Patrick* Court strips a Debtor of a Constitutional right when there is no language in the Bankruptcy Statutes to support such a finding. The idea that an individual can be so easily stripped of a Constitutional right is repugnant to the U.S. Constitution. It is particularly repugnant in considering that some bankruptcies are involuntary.

It also raises the question: Where does it stop? For example, in the instant case the Trustee also successfully stripped the Debtor of her Fifth Amendment Privilege. As the facts illustrate, the Trustee was working integrally with the Maryland Attorney General's Office. The Trustee was aware that there was a pending indictment which was identical to her Adversary Proceeding Against Discharge-ability. Yet, the Trustee argued before the Court that the

Debtor had no reasonable basis for asserting her Fifth Amendment Privilege, and the Court ruled in the Trustee's favor.

Thus, the rulings coming from the Fourth Circuit raise a much bigger Federal Question than simple search and seizures. That is, what, if any, Constitutional Rights and Privileges may a Trustee waive in behalf of a Debtor without statutory authority? And must those waivers be expressly limited by the Bankruptcy Statute, or can they be inferred by the wide discretion granted to a Trustee by this Honorable Court?

There are no uniform policies and procedures for Trustees to follow in conducting searches and seizures, and no uniform procedures to protect debtors from abuse of process:

Since waiver of Constitutional Rights and Privileges, such as search and seizures, are not directly conferred upon a Trustee via statute, unlike other entities the Trustee does not have the benefit of the statutory rules to govern the policies and procedures in implementing these important Constitutional waivers. Thus, it is not surprising that the rulings are inconsistent amongst the jurisdictions.

Just as there are no uniform policies and procedures to guide the Trustee in how and when to waive these rights, there are also no policies and procedures to protect Debtors from abuse of process. Common sense would dictate that those Courts who are so easily stripping Debtors of their Constitutional rights without statutory support are unlikely to be a forum for proper redress of abuse absent clear statutory definition to do so.

This is certainly evident in the case at bar. This is a case where the undisputed facts illustrate that the respondent broke into the petitioner's home before she had even bothered to file the paperwork of her assignment with the Court; nor did she obtain a Court Order to do the search; nor did she obtain a Court Order to seize the property, even though she seized property without giving the petitioner an

opportunity to surrender the assets. After seizing the property, she left the property for months unattended, and when she finally returned, the property had been burgled. The Court ruled she was merely doing her job in collecting the assets.

C. *Should Trustees be allowed to conduct a search without a Court Order?*

1. *This Honorable Court Has Mandated Warrants For Inspection of Residences Absent Specific Circumstances.*

This Honorable Court has ruled that "an unconsented, warrantless search of private property is 'unreasonable'" absent specific circumstances (*Camara v. Municipal Court*, 387, 523, 528-529, 1967). And "[When] the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a . . . government enforcement agent". (*Id.* at 529). In addition, warrants should only be issued after entry is refused (*Id.* at 524, 539-540).

2. A Warrantless Search was not Justified.

Warrantless searches of residences require specific circumstances. These are: (1) Consent, which was not given; (2) Search incident to arrest, which does not apply; (3) Plain view, which does not apply; (4)(A) Exigent circumstances (rescue, property damage, public danger, destruction of evidence, hot pursuit, prevent escape) and (B) there is probable cause to believe evidence of a crime is on the premises and the government enforcement agent is aware of specific facts which reasonably indicate that someone on the premisis would destroy or remove the evidence if time were taken to issue a warrant (Only destruction of evidence might possibly apply, but no one was at the house so this, too, does not apply); (5) Abandonment, but the petitioner has shown on page 24 that abandonment does not apply; (6) Automobile exception, which does not apply; and (7) Probation search, which does not apply.

Nothing in bankruptcy law defines a Chapter 7 trustee as an enforcement agent, but only as an administrative agent.

The respondant did not assert probable cause for the search. Also, the Bankruptcy Court's statement in its summary judgement that there were exigent circumstances for the converson hearing (AP3 at 40) is clearly erroneous as supported by the facts in the court record. The emergency hearing was obtained for conversion of the bankruptcy to Chapter 7 through an assertion of exigent circumstances, but after the Court examined the evidence, he ruled, on the same day as the search and seizure, that there was insufficient evidence of exigent circumstances: "Okay. I have an emergency motion here and it's been joined in by the United States Trustee. The system has a concern with what's going on with Coleman Craten LLC. From the evidence I heard today about removal of records, I can draw no conclusion that that was for an improper purpose or a proper purpose. As the explanation that they may be being delivered to an account[ant] for an analization for the debtor or somewhere else is simply based on what I've heard today. I couldn't draw a conclusion. It's not something that's so convincingly put before me that I can draw any conclusion one way or the other."

In the present case, originally the respondent merely asserted immunity. However, as the case progressed, the respondent began asserting that she believed the property was abandoned, and that she believed she needed to act because of the multiple fraudulent claims against the petitioner. But during discovery, and through subsequent pleadings, it was established that the respondent and her employees were making inconsistent statements within the record regarding these issues. These discrepancies were brought to the Bankruptcy Court's attention in a challenge to the merits of the respondent's affidavit to support her motion for summary judgment. While the Bankruptcy Court, relying on the respondent's affidavit, ignored the inconsistencies and ruled in favor of the respondent, the Circuit Court For Baltimore City was not so compliant in accepting her statements regarding abandonment and the condition of the home.

Examples of the inconsistencies, which are numerous, include the following: In testimony before the Court, the respondent's counsel denied that they had met with the Hydes, who held adverse interests to the estate, prior to the conversion hearing, but depositions showed that they had. The respondent made statements to the Courts and to the press that the residence was trashed, but the pictures they took belied their statements (except the child's room was strewn with toys). Their assertion that when they arrived they believed the property was abandoned was challenged with such evidence as a car in the driveway, their acknowledgement that they saw high-quality furnishings and paraphernalia within the home (which they admit they saw from outside) and the fact that the home number was listed on the bankruptcy forms. The respondent admitted in deposition that search and seizure was part of her normal practice. In addition, in a hearing on February 3, 2000, with the respondent present, the respondent's counsel testified that they did not file an insurance claim on property stolen from the petitioner's house because they believed that the petitioner might have been involved in the theft. When the insurance information was subpoenaed, they admitted that there never was an insurance policy to cover the stolen items.

3. *Damages*

This Honorable Court has ruled that damages may be recovered where a person acting under federal law conducts an unreasonable search and seizure (*Bivens v. Six Unknown Agents*, 403 U.S. 388, 1971). This Court has also ruled that a Trustee is liable if she does that which she is not allowed to do (*Moser v. Darrow*, 341 U.S. 267,1951). The petitioner believes that liability should pivot on whether the Trustee obtained a Court Order, and again, turns to *Moser v. Darrow* for support. There is no statutory support that empowers a Trustee to engage in searches and seizures. Therefore, if a Trustee decides to use strong-arm tactics in unauthorized conduct, than the Trustee should be liable for harm caused. However, if a Trustee seeks Court intervention, and acts

upon the Court's authorization, there should be no liability. In *Moser v. Darrow*, 341 U.S. 267,1951, the Court supports such a conclusion.

II. The petitioner asks whether the "wide discretion" ruling replaces the strict liability standard when a trustee violates Bankruptcy statute.

Specific to the instant case, the petitioner asks whether the "wide discretion" ruling of *Commodity Futures Trading Comm'n v.Weintraub* (471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985)) replaces the strict liability standard under *Moser v. Darrow*, 341 U.S. 267,1951, when a Trustee violates Bankruptcy Statute and/or is involved in activity not specifically authorized by bankruptcy statute or court order.

What are the limits on the "wide discretion" dicta in *Weintraub*? May lower Courts allow a Trustee to individually define their "scope of duty", even if it involves activity not specifically authorized by Bankruptcy Statute? May lower courts use the wide discretion dicta of *Weintaub* to provide immunity to trustees who clearly violate bankruptcy statute?

In *Moser v. Darrow*, 341 U.S. 267, 1951, this Honorable Court made it clear that if a trustee does that which she is not allowed to do, she is liable. The ruling in *Moser* is based on a Trustee's violation because her actions were not authorized under Bankruptcy Law. However, in *Weintraub*, this Honorable Court carved out an exception, allowing Trustees to engage in conduct not specifically authorized by Statute, but interpreted through Legislative history. *Commodity Futures Trading Comm'n v.Weintraub* (471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985))

In *Weintraub*, this Honorable Court made it clear that "the powers and duties of a bankruptcy trustee are extensive" (*Weintraub*, 471 U.S. at 352, 105 S.Ct. at 1993). This Honorable Court went on to explain that a Trustee could waive attorney-client privilege—an action not specified within the Bankruptcy Statutes. This ruling opened a Pandora's box leading to inconsistent rulings amongst the

jurisdictions regarding what a trustee is allowed to do. Pursuant to *Weintraub*, the trustees' actions in performing their duties no longer have to be specified within the Statutes and leaves the lower courts without direction on the limitations of the term "wide discretion". The courts must struggle on how to determine if a trustee is acting outside the scope of her duty—a matter which is already inconsistent amongst different jurisdictions.

There are many cases to support that the Courts had indeed been struggling with this issue before the introduction of *Weintraub*. Some jurisdictions have defined that a Trustee is liable if the harmful action cannot be supported by established Bankruptcy law, which is consistent with *Moser*. Other jurisdictions, as the Fourth Circuit illustrates in the instant case, have found that "scope of duty" is equivalent to a "good faith" standard, i.e., the Trustee was trying to perform her duties when she violated the law, for which she was granted immunity. This, of course, is inconsistent with the findings in *Moser* where it was found that a Trustee need not be recalcitrant to be liable, but only doing that which she is not authorized to do.

It is not surprising that it is the latter jurisdictions that are justifying unauthorized trustee's actions and broadening trustee's powers through the wide discretion language of *Weintraub*. These jurisdictions appear to ignore the carefully carved-out exception in *Weintraub* where this Honorable Court explained how the empowerment granted to the trustee in *Weintraub* came from the trustees' already-established role under bankruptcy law history, which was applicable to the specific issue presented in *Weintraub*, i.e., whether a trustee may waive a corporate debtor's attorney-client privilege. While there is no indication that *Weintraub* was intended to reach so far as to overturn this Honorable Court's decision in *Moser*--that a trustee is liable if she takes action not authorized under bankruptcy law--the practical result of the application of the wide discretion language of *Weintraub* is equivalent to absolute immunity, as it is applied in some

jurisdictions. Indeed, in some jurisdictions, as is evident in the case at bar, expand the trustees' powers under the wide discretion concept in even allowing trustee to deprive debtors of their fundamental Constitutional rights and privileges.

Thus, in order for the standard of qualified immunity to apply consistently throughout the jurisdictions, as opposed to absolute immunity for Trustees, the application of wide discretion as applied to established bankruptcy law needs to be clarified.

A. *What is the Impact Of A Court Order On The Liability Standard Applied?*

One glaring difference between *Moser* and *Weintraub* involves Court intervention. In *Weintraub* the Trustee sought and obtained a Court Order to pierce the Attorney-Client Privilege of the Debtor Corporation, whereas in *Moser* the Trustee did not seek Court approval for her action. What the *Moser* Court clearly defines is that when Trustees have Court approval, *via* court order, for their actions they are shielded from liability, thereby giving them absolute immunity. As *Moser* equally points out, a Trustee is liable for unauthorized actions. Taken in this context, the rulings between *Moser* and *Weintraub* are not inconsistent. Unfortunately, the importance of a Court Order is lost in some jurisdictions. For example, in the case at bar, it is undisputed that the Trustee took unauthorized action and violated numerous statutory Bankruptcy Laws without a court order to do so. It is undisputed that many of these violations involved the Notice requirements.

The unauthorized actions and violations were presented to the Court in the petitioner's Memorandum of Law Requesting Summary Judgment. The Trustee did not deny the allegations, but sought immunity. The Bankruptcy Court granted immunity on a "wide discretion" basis. The Court also raised essential issues *sua sponte* without giving the petitioner an opportunity to correct the defect, which is inconsistent with this Courts' ruling in *Celotex Corp. v. Catrett*, 477 U.S. 317, 1986.

B. Under What Conditions Can Harmless Error Be Applied To Allow Trustees To Escape Liabilities For Depriving Debtors Of Their Rights Without a Court Order?

In some jurisdictions, the Courts are finding Trustees' unauthorized actions and violations of bankruptcy law to be harmless error, thereby excusing them from liability for those actions. But such actions without statutory authority of court intervention are repugnant to the rights and privileges afforded every individual under the United States Constitution.

There is a danger in allowing harmless error excusability in depriving rights and privileges otherwise afforded to individuals. If a bankrupt debtor is entitled to a right under Bankruptcy Law, and Trustees are excused for depriving the debtor of said rights, where does it stop--one right, two rights, a dozen rights, a Constitutional Right? There is nothing within the Bankruptcy Statute that places debtors on notice that Trustees need not adhere to Bankruptcy Laws, or that the debtors are giving up Constutional Rights. But effectively, it is occurring with disturbing regularity within some jurisdictions, as is evidenced in the instant case.

III. The petitioner asks whether a Trustee should be able to escape liability when the Debtor asserts Fifth Amendment Privilege and a *prima facie* case is established through Court documents and Depositions of the Trustee and her Agents.

It should be noted that this case qualifies for a remand under a *Writ of Mandamus*. However, because the issues of federal law that have been unresolved and presented herein could readily resolve the case, the petitioner has not submitted the *Writ of Mandamus* at this time..

In the instant case, in its ruling granting summary judgment to the respondent, the Bankruptcy Court determined that the petitioner had implemented the Sword/Shield Doctrine, and therefore, could not recover. However, in both her memorandum of law and the hearing

before the Court, the petitioner illustrated that the testimony of the petitioner was not necessary to establish the cause of action, and that all documents and information necessary to establish the claim had been provided to the respondent. As was established in *Wood v. Allstate Ins. Co.*, 21 F.3d 741 745 (7th Cir. 1994), "Non-cooperation must be material." At no time during the hearing, or prior to the ruling, did the Court indicate that the petitioner would not be able to pursue the claim if she continued to assert her Fifth Amendment Privilege. Contrary to *Celotex Corp. v. Catrett*, 477 U.S. 317, 1986 the Court also raised essential element issues *sua sponte* without giving the petitioner an opportunity to cure the defect.

Therefore, there are two important issues raised. The first is stated in the title to this section. The second, and related question, is: If a trustee engaging in misconduct forces the debtor to seek the protection of the Fifth Amendment privilege because of the trustee's misconduct, is the debtor bared from recovery? The petitioner asks the Court to accept this *Writ* to address these questions.

IV. Petitioner asks whether the Courts in the instant Case need directon in applying statute and case law.

The petitioner was denied the due process afforded under the U.S. Constitution as the judiciary system did not apply applicable law in making their determinations, nor did they explain why they deviated from established law.

CONCLUSION

This is a complex case. Petitioner prays that this Honorable Court will accept this petition for *Writ of Certiorari* as it proffers important questions of law involving trustees' powers and debtors' rights under applicable bankruptcy laws, which are currently being inconsistantly applied throughout the jurisdictions. Without finite resolution of these issues, debtors filing bankruptcy in some jurisdictions are abdicating important rights and privileges, some of which are Constitutional, wherein said application is brought about not by statute but by such mechanisms as absolute immunity

for trustees and trustees' limitless powers to waive debtors' rights. The petitioner believes that by accepting this petition for *Writ of Certiorari*, this Honorable Court will clarify these issues so that lower courts will be uniformly directed and that trustees and debtors alike will have notice as to trustees' powers and debtors' rights. The petitioner further prays that this Honorable court will consider the adjudication of the instant case by the three courts and will accept this petition for *Writ of Certiorari* in order to guide the hand of justice to apply current law in this case.

Monica Lynn Coleman
Pro se

APPENDIX 1

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-2186

In Re: MONICA LYNN COLEMAN;
In Re: COLEMAN CRATEN, L.L.C.,
Debtors.

MONICA LYNN COLEMAN,
Plaintiff - Appellant,

versus

LORI SIMPSON, Trustee,
Defendant - Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Marvin J. Garbis, District Judge. (CA-00- 3788-MJG, BK-99-56239, AP-99-5665-SD, AP-99-5667-SD)

No. 01-2374

In Re: MONICA LYNN COLEMAN,
Petitioner.

On Petition for Writ of Mandamus. (CA-00-3788-MJG)

Submitted: March 21, 2002
Decided/Entered: March 27, 2002
Before NIEMEYER, WILLIAMS, and MICHAEL, Circuit Judges.

No. 01-2186 affirmed and No. 01-2374 petition denied by unpublished per curiam opinion.

Monica Lynn Coleman, Appellant Pro Se.
Kevin Gerald Hroblak, WHITEFORD, TAYLOR & PRESTON, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

In No. 01-2186, Monica Coleman appeals from the district court's order affirming the Bankruptcy Court's order denying relief on her claims against the Trustee in the underlying bankruptcy proceeding. Our review of the record and the opinions below discloses no reversible error. Accordingly, we affirm on the reasoning of the District Court. Coleman v. Simpson, Nos. CA-00- 3788-MJG; BK-99-56239; AP-99-5665-SD; AP-99-5667-SD (D. Md. Sept. 13, 2001). In No. 01-2374, Coleman petitions for a writ of mandamus directing the District Court to forward to this court the designated portions of the Bankruptcy Court record. Because the record has since been received by this court, we deny the petition for a writ of mandamus as moot. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

No. 01-2186 - AFFIRMED
No. 01-2374 - PETITION DENIED

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

In Re:
COLEMAN CRATEN, LLC
Debtor
In Re:
MONICA LYNN COLEMAN
Debtor
MONICA LYNN COLEMAN
Appellant
vs. * CIVIL ACTION NO. MJG-00-3788
LORI SIMPSON, TRUSTEE
Appellee

Decided September 13, 2001

DECISION ON APPEAL

The Court has before it Appellant Monica Lynn Coleman's appeal of a final order in which the United States Bankruptcy Court for the District of Maryland (Derby, J.) denied Appellant's Motion for Summary Judgment and granted Appellee's Motion for Summary Judgment, and the materials submitted by the parties relating thereto. The Court has held a hearing on this appeal and had the benefit of the arguments presented.

I. BACKGROUND

Appellant Monica L. Coleman ("Coleman" or "Appellant") filed a Voluntary Petition for Relief under Chapter 7 of the Bankruptcy Code on May 7, 1999. Coleman Craten, LLP ("Coleman Craten"), a company partially owned by Coleman, filed a Voluntary Petition for Reorganization under Chapter 11 on May 11, 1999. Shortly thereafter, the

U.S. Trustee appointed Appellee Lori S. Simpson ("Simpson" or "Appellee" or "Trustee") to serve as the Chapter 7 Trustee in Coleman's case. To assist Simpson with her investigation and administration of Coleman's estate, both counsel (Whiteford, Taylor & Preston, L.L.P. ("WT&P")) and an asset manager (Financial Conservators, Inc. ("FCI")) were employed.

On May 13, 1999, Simpson, WT&P, and FCI traveled to two residences in Coleman's estate to begin the process of inspecting and securing estate assets for liquidation. According to Simpson, she and her companions discovered the exterior and interior of the residence to be in complete disarray. The lawn was not maintained, several animals were penned in cages covered with animal waste, and financial records of both Coleman and Coleman Craten were strewn about the house. After performing a preliminary search of the premises and analysis of the relevant documents discovered therein, Simpson changed the locks, secured the financial records, and made arrangements to secure the premises.

An emergency motion to convert the Coleman Craten case to Chapter 7 was filed by several creditors of the Coleman Craten estate on May 13, 1999. Subsequent to an expedited evidentiary hearing on the emergency motion, the Bankruptcy Court converted the Coleman Craten case to Chapter 7 on the basis that it was a stockbroker and not eligible to be a debtor under Chapter 11. After the Bankruptcy Court entered its ruling, the U.S. Trustee appointed Simpson as trustee in the Coleman Craten case.

Simpson, in her capacity as trustee of both Coleman's estate and Coleman Craten's estate, took Coleman's depositions on June 2, 1999 and again on March 21 and 22, 2000. During the depositions, Coleman asserted her Fifth Amendment privilege to virtually every question asked of her. Coleman's husband, Richard Coleman, was deposed on June 17th and September 20th of 1999, and likewise asserted his Fifth Amendment privilege to most of the questions asked by the Trustee.

On September 10, 1999, Coleman filed the underlying complaint, entitled "Complaint Against Chapter 7 Trustee" (the "Complaint"). The Complaint alleges ten causes of action against Simpson including fraud, breach of fiduciary duty resulting in acts of gross negligence, and several tortious acts. Subsequent to the close of discovery in July 2000, cross motions for summary judgment were filed by the parties, On November 20, 2000, the Bankruptcy Court entered a Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment finding that the record was devoid of any substantial evidence that the Trustee acted outside the scope of her authority at any time relevant to the administration of Coleman's and Coleman Craten's estates. Coleman filed a timely notice of appeal on December 1, 2000.

II. STANDARD OF REVIEW

When a District Court reviews a Bankruptcy Court final Order, the District Court acts as an appellate court. Matters within the Bankruptcy Court's discretion are reviewed under an abuse of discretion standard. *In re Arnold*, 806F.2d 937, 938 (9th Cir. 1986). That is, the Bankruptcy Court's decisions within its discretion will be reversed only if they were "based on an erroneous conclusion of law or when the record contains no evidence on which the[Bankruptcy Court] rationally could have based [the decisions]." *In re Windmill Farms, Inc.*, 841 F.2d 1467, 1472 (9th Cir. 1988) (citing *In re Hill*, 775 F.2d 10-37, 1040 (9th Cir. 1985)). Accordingly, legal conclusions are reviewed de novo, whereas findings of fact may be set aside only if clearly erroneous. *See In re Bulldog Trucking, Inc.*, 147 F.3d 347 (4th Cir. 1998)

III. DISCUSSION

A. Summary Judgment Standard

In deciding a summary judgment motion, a court must look beyond the pleadings and determine whether there is a genuine need for trial. *See Matsushita Electric Industrial Co.,*

Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). A court must determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether that evidence is so one-sided that one party must prevail as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-53 (1986). If "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact," summary judgment is appropriate. Fed. R. Civ. P. 56(c); *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In determining whether a party is entitled to summary judgment, the record is viewed in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)

An issue of fact must be both genuine and material in order to forestall summary judgment. An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party. *See Anderson*, 477 U.S. at 248. An issue of fact is material only if the establishment of that fact might affect the outcome of the lawsuit under governing substantive law. *See id.* The production of a mere scintilla of evidence in support of an essential element, moreover, will not forestall summary judgment. *See id.* at 251.

B. Simpson's Motion

The Complaint against Simpson was construed by the Bankruptcy Court to make claims against Simpson personally and not in her official capacity. It is true that there can be found in the Complaint some reference to a negligence theory but, in context, the essential nature of all claims being made against Simpson was for allegedly fraudulent and/or grossly negligent actions and/or inactions outside the scope of the duties of a properly acting trustee. This Court has been presented with no reason adequate to warrant its reversing the bankruptcy judge as to the interpretation of the nature of the Complaint. Indeed, in context, this Court agrees with the

Bankruptcy Court's interpretation. Moreover, in view of the fact that Simpson became trustee in 1999, there remains ample time for Coleman to pursue whatever claims she may have against Simpson in her official capacity.

A trustee can be held personally liable only for injuries arising from "willful or intentional misconduct." *Weiss v. First Citizens Bank & Trust Co.* 111 F.3d 1159, 1168 (4th Cir. 1997)(citing *Yadkin Valley Bank & Trust Co. v. McGee*, 819 F.2d 74, 76 (4th Cir. 1987)). Since Coleman bears the burden of persuasion at trial, Simpson needs only to demonstrate that the record is absent of substantial evidence to support a required element of a claim alleged by the Appellant. In the instant case, the record does not include admissible evidence that would permit a reasonable fact finder to find for Coleman on any of her claims against Simpson. Moreover, the evidence presented establishes that the actions complained about by Coleman were taken in the course of performing her official duties as Trustee under the Bankruptcy Code.

Coleman claims that the Bankruptcy Court punished her for exercising her Fifth Amendment privilege against self incrimination during discovery proceedings. The Fourth Circuit, however, has made it clear that the Fifth Amendment privilege may not be used by a civil litigant as a sword to advance certain interests in the litigation, while at the same time as a shield to undermine the opposing party's efforts to obtain discovery and advance its own interests in the litigation. *See In re Edmond*, 934 F.2d 1304, 1308 (4th Cir. 1991). While a Plaintiff can assert her Fifth Amendment privilege, she still must rebut a motion for summary judgment by presenting admissible evidence sufficient to establish genuine issues of material fact. Coleman has failed to present sufficient admissible evidence to establish any of her claims against Simpson.

The particular claims made by Coleman have been adequately discussed in the Memorandum Opinion of the Bankruptcy Court with which this Court fully agrees.

C. Coleman's Motion

Coleman moved for summary judgment. Of course, based upon the rationale for the grant of summary judgment to Defendant Simpson, the bankruptcy judge properly denied summary judgment to Plaintiff Coleman. Coleman's appeal from the denial of summary judgment, even if procedurally proper, is meritless.[1]

IV. CONCLUSION

For the foregoing reasons:

1. The Bankruptcy Court's November 20, 2000 Order Granting Defendant's Motion for Summary Judgment is AFFIRMED

2. The Bankruptcy Court's November 20, 2000 Order denying Plaintiff's Motion for Summary Judgment is AFFIRMED.

SO DECIDED this 13th day of September, 2001.

s/Marvin J, Garbis
United States District Judge

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[1] Denial of summary judgment in the instant case was an interlocutory order from which no appeal would lie.

APPENDIX 3

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND
At Baltimore

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT

Case Nos. 99-5665 and 99-5667-esd
Decided November 20, 2000

Before the Court are cross motions for summary judgment filed by the Plaintiff/Debtor Monica Lynn Coleman ("Coleman") and the Defendant/Trustee, Lori Simpson. For the reasons stated below, the court will deny Coleman's motion and grant the Defendant's motion.

I. Background

Ms. Coleman filed a petition under Chapter 7 of the Bankruptcy Code on May 7, 1999. Lori Simpson, the Defendant, was appointed to serve as the Chapter 7 Trustee in Ms. Coleman's case by the U.S. Trustee. On May 11, 1999, a company partially owned by Ms. Coleman, Coleman Craten, LLP, filed a voluntary petition for reorganization under Chapter 11. Shortly after she was appointed Trustee for Ms. Coleman's estate, Ms. Simpson began investigating Ms. Coleman's assets, businesses, and other financial affairs. She employed counsel, Whiteford, Taylor & Preston, L.L.P., ("WT&P") and an asset manager, Financial Conservators, Inc.("FCI") to assist her with administration of the Estates. On May 13, 1999 the Trustee and WT&P and FCI went to two residences in Ms. Coleman's estate to inspect and secure the assets, and to begin to administer and liquidate these assets. (*See* Transcript of May 13, 1999 Hearing on Emergency Motion To Convert Case to Case Under Chapter

7 and for Joint Administration at 14-16).

Upon arriving at the first property located at 415 Edgewater Road in Pasadena, Maryland, the Trustee testified she noticed that the lawn was not maintained. Id. At 15. After gaining access to the property, with the assistance of a locksmith, the Trustee noticed financial records of the Monica Coleman Estate and the Estate of Coleman Craten, LLC strewn about the house. Id. She also noticed that there were several animals, including a rabbit, a dog, and a cat penned in cages in the living room and bathroom. *Id.* These cages were covered with animal waste, indicating that that owner may not have been home for some time. *Id.*

The Trustee began searching through the premises and conducted a preliminary analysis of the documents therein. The Trustee found bank records for both Ms. Coleman and Coleman Craten, as well as some accounts reflecting either joint deposits or savings bonds in Ms. Coleman's name or the name of her husband, and checks, check registers and deposit slips evidencing transactions in excess of $100,000. *Id.* At 15-16. The Trustee secured these documents, changed the locks, and made arrangements to secure the premises. *Id.*

On May 13, 1999, James R. Hyde and Carol Hyde, creditors of the Coleman Craten estate, through counsel, filed an emergency motion to convert the Coleman Craten case to Chapter 7. The U.S. Trustee filed a concurrence. Due to the exigent circumstances, a hearing on the motion was held on an expedited basis. At the hearing, Ms. Coleman's and Coleman Craten's attorney appeared and argued in opposition to the motion to convert. The Trustee appeared as a witness to inform the court of what she discovered during her investigations.

After hearing evidence presented by the parties at the hearing, the court converted the Coleman Craten case to Chapter 7 because it was a stockbroker and not eligible to be a debtor under Chapter 11. 11 U.S.C.§ 109(d). On the same day, the U.S. Trustee appointed Ms. Simpson as Trustee in

the Coleman Craten case. On May 14, 1999, the Trustee filed an Emergency Motion for Entry of Order Establishing Procedure for Examination of and Release of Non-Estate Assets, in which, among other things, the Trustee required continuing authority to secure and maintain 415 Edgewater and to complete an inventory of the property located therein. The Trustee also sought to establish procedures under which personalty at 415 Edgewater would be processed.

On May 15, 1999, the Trustee and Mr. and Mrs. Coleman entered into an Occupancy Agreement, which was approved by the court on June 11, 1999. The Occupancy Agreement allowed the Colemans and their son to reside in 417 Edgewater, a property in the Trustee's possession. Paragraph 8 of the Occupancy Agreement states, in part, that "[t]he Colemans shall and do hereby consent to the relief sought by the Trustee in [the Orderly Turnover of Assets Motion]." It further states that "the Trustee has taken lawful possession of the [residences] and has secured their contents to prevent theft, damage, or other harm to the [residences] and their contents." On May 15, 1999, the Colemans also filed a line consenting to the Orderly Turnover of Assets Motion.

The Trustee deposed Ms. Coleman on June 2, 1999 and again on March 21 and 22, 2000. On all three dates, Ms. Coleman asserted the Fifth Amendment privilege to virtually all questions asked of her, with the exception of her name. Trustee's counsel also deposed Richard Coleman, Ms. Coleman's husband, on June 17 and September 20, 1999. Mr. Coleman asserted the Fifth Amendment privilege to most of the questions asked of him.

Ms. Coleman's Complaint alleges that "the Trustee breached her fiduciary duty(s), which resulted in acts of gross negligence" and irreparably harmed Coleman, the Creditors, and the estate of both Ms. Coleman and Coleman Craten. (See Complaint at 11). In support of her claim, Ms. Coleman argues that the Trustee failed to consider her recovery plan for Coleman Craten, LLP, and that as a result, Coleman

Craten's case was converted into a Chapter 7 liquidation which resulted in harm to creditors of the estate and other interested parties. She further alleges that "[t]he undisputed facts show that the Trustee engaged in an improper pursuit of an adverse interest to the estate." (Plaintiff's Memorandum in Support of her Motion for Summary Judgment at 56). Ms. Coleman claims that the Trustee "defrauded the interested parties in the bankruptcy by taking actions that promoted concealment of her mistake," which caused additional harm to Ms. Coleman, to creditors of Ms. Coleman and Coleman Craten, and to the estate (Complaint at 12). She also alleges that the Trustee committed the tort of invasion of privacy by placing Ms. Coleman in a false light by stating that Ms. Coleman "was involved in a criminal scheme to divert funds." (Complaint at 81). Finally, Ms. Coleman asserts that the Trustee "failed to sue reasonable care in protecting assets within her possession", which "was grossly negligent in the administration of the estate." (Complaint at 13). In support of this allegation, Ms. Coleman asserts that the trustee "evicted" her from her home at 415 Edgewater, and that the properties lost value because the Trustee refused to allow Ms. Coleman to care for them. Ms. Coleman further alleges that the Trustee failed to respond after Ms. Coleman notified her that several "thefts" had occurred at the properties.

Ms. Coleman has placed the allegations outlined above into ten causes of action: (1) Breach of Fiduciary Duty Resulting in Gross Negligence; (2) Fraud by Negligent Misrepresentation; (3) Misrepresentation; (4) Fraud by Concealment or Deceit; (5) Defamation; (6) Invasion of Privacy by Placing Plaintiff in False Light; (7) Fraud by Partial and Fragmentary Disclosure; (8) Perjury; (9) Negligence Caused by Breach of Fiduciary Duty to Care to Protect Assets; (10) Misappropriation of Assets/Funds Causing Contracting Breach; and (11) Gross Negligence in Bankruptcy Administration.

II. Evidence Submitted

The Trustee has filed two main exhibits and six sub-exhibits in support of her motion. The Trustee's first main exhibit is her own Affidavit (Def.Exh. 1). Ms. Simpson has attached several exhibits to her Affidavit, including (a) a handwritten letter dated May 12, 1999 addressed to Richard and Monica Coleman (Exh. 1-A), (2) a transcript of proceedings before the court on May 13, 1999 (Exh. 1-B), (3) a copy of an Emergency Motion by the Trustee for entry of an order establishing a procedure for examination and release of non-estate assets (Exh. 1-C)(4) a copy of an Occupancy Agreement between Mr. Richard Coleman, Monica Coleman, and the Trustee (Exh. 1-D), (5) a copy of Mr. Richard Coleman and Ms. Coleman's Line consenting to the relief sought in the Trustee's motion for entry of order establishing a procedure for examination and release of non-estate assets (Exh. 1-E); and (6) a copy of an order of the court approving the Occupancy Agreement between Mr. Richard Coleman, Ms. Coleman and the Chapter 7 Trustee (Exh. 1-F). The Trustee has also submitted a copy of Ms. Coleman's deposition transcript (Def. Exh. 2).

In support of her Motion for Summary Judgment, Ms. Coleman has submitted documents including: (1) a copy of a newspaper article published in the Baltimore Sun on June 4, 1999 (Plain. Exh. 1); (2) a copy of the deposition of Lori Simpson on July 21, 2000 (Plain.Exh.2); (3) a copy of the Trustee's application for authority to employ an asset manager and auctioneer filed with the court on June 23, 1999 (Plain. Exh. 3); a copy of a transcript of trial proceedings before the court on February 3, 2000 (Plain. Exh. 4); a copy of a transcript of a hearing before the court on May 13, 1999 on an Emergency Motion to Convert Case to Case Under Chapter 7 and Joint Administration (Plain. Exh. 5); a copy of the Trustee's Motion for Joint Administration (Plain. Exh. 6); a copy of the Affidavit of Lori S. Simpson (Plain. Exh. 7); a copy of the Trustee's Memorandum in Support of her Emergency Motion to Convert Chapter 11 Case to Chapter 7

and for Joint Administration (Plain. Exh. 8); a copy of a signed statement by John M. Conelius dated October 16, 1999 (Plain. Exh.9); a copy of Coleman and Craten, LLC's Articles of Organization (Plain. Exh. 10); a copy of Coleman Craten Financial Club, Inc. (Plain. Exh. 12); and a copy of a promissory note in the amount of $5,000,000 dated May 20, 1999 (Plain. Exh. 13).

On October 20, 2000 Ms. Coleman submitted copies of these exhibits and also several additional exhibits as part of her pre-trial witness and exhibit list. These include a copy of a bill from Ballard Spahr Andrews and Ingersoll, LLP (Plain. Pre-Trail Exh. 1); a copy of Coleman Craten, LLC's Business Plan (Plain. Pre-Trial Exh. 3); and a copy of sublet projections," (Plain. Pre-Trial Exh 4).

III. Admissibility of Evidence

All of the exhibits listed above are admissible, except for Plaintiff's Exhibits 1, 9 and 13 and Plaintiff's Pre-Trial Exhibits 1, 3, and 4. Plaintiff's Exhibit 1[1] includes a copy of a newspaper article published in the Baltimore Sun on June 4, 1999 and is inadmissible hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). A "fine line between the permissible use of articles to demonstrate general public knowledge and the impermissible use of articles," exists in ruling on whether newspaper articles are hearsay when articles are submitted to prove the factual matters asserted therein. *United States v. ReBrook*, 58 F.3d 961, 968 (4th Cir. 1995), *cert. denied*, 516 U.S. 97 (1995). Objections to newspaper articles on hearsay grounds should be sustained unless it can be shown that the articles fit within one of the hearsay exceptions. *Id.* Ms. Coleman has not laid a foundation for the article to explain how it fits within an

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[1] Plaintiff's Exhibit 1 actually contains two documents, a copy of the Complaint and the newspaper article discussed in this section. The newspaper article was attached as an "exhibit" to the Complaint. It is only the newspaper article that is inadmissible.

exception to the hearsay rule.

Plaintiff's Exhibit 9 purports to be a copy of a typewritten summary titled "Conversation Regarding Creditors' Committee." The document is dated October 16, 1999 and bears a signature above the words "John M. Conelius." Ms. Coleman asserts that this document is evidence that the Trustee wrongfully induced certain creditors "not to attend meetings or hire attorneys, but did not indicate to these creditors that by taking the Trustee's advice, they were abdicating a right to replace the Trustee." (*Plaintiff's Motion for Summary Judgment* at ¶47). This exhibit is inadmissible hearsay because it is an out of court statement that Ms. Coleman has offered to prove the truth of the matter asserted. *See* Fed.R.Evid. 801(c). The exhibit is also inadmissible under Fed.R.Evid. 901(a), which requires documents to be authenticated prior to admission. *See* Fed.R.Evid. 901(a) ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). The authentication requirement might also be satisfied for summary judgment purposes by an affidavit on personal knowledge, but none has been included here.

Plaintiff's Exhibit 13 purports to be a copy of a promissory note in the amount of $5,000,000 dated May 20, 1999. The document is also inadmissible pursuant to Fed.R.Evid. 901(a) because there is no affidavit or evidence to support Ms. Coleman's assertion that the document is what she claims it to be.

Plaintiff's Pre-Trial Exhibit 1 purports to be a copy of a letter signed by attorney Gregory Reed of the law firm of Ballard Spahr Andrews & Ingersoll, LLP dated August 3, 1998 and an attached statement for services rendered. Plaintiff's Pre-Trial Exhibit 3 is a copy of Coleman Craten, LLC's Business Plan. Ms. Coleman claims that Plaintiff's Pre-Trial Exhibit 4 is a copy of "sublet projections." Each of these documents document (sic) is inadmissible hearsay and is

further inadmissible pursuant to Federal Rule of Evidence 901(a) because the documents have not been authenticated and there is no affidavit on personal knowledge or evidence to support Ms. Coleman's assertion that the documents are what she claims them to be.

Because Plaintiff's Exhibits 1, 9, and 13 and Plaintiff's Pre-Trial Exhibits 1, 3 and 4 do not constitute material which may be considered on a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, they will not be considered.

IV. Summary Judgment Standard

The court's standard of review for summary judgment is set forth in *Ramsey v. Bernstein (In re Bernstein)*, 197 B.R. 475 (*Bankr.D.Md.* 1996) *aff'd* 113 F.3d 1231 (4th Cir. 1997):

> Pursuant to Fed.R.Civ.P. 56(c), made applicable by Bankruptcy Rule 7056, summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R.Civ.P. 56(c). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). In determining the facts for summary judgment purposes, the court may rely on affidavits made with personal knowledge that set forth specific facts otherwise admissible in evidence and sworn or certified copies of papers attached to such affidavits. Fed.R.Civ.P. 56(e), made applicable by Bankr. Rule 7056. When a motion for summary judgment is made and supported by affidavits or other evidence, "an adverse party may not rest upon mere allegations or denials. . ." *Id.* While the court must construe all inferences in favor of the non-moving party, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255, 106 S.Ct. At

> 2513-14, the court is bound by factual determinations made in prior actions where collateral estoppel applies. *Allen v. McCurry*, 449 U.S. 90, 94-95, (1980).

197 B.R. at 477.

For a summary judgment motion where the nonmovant has the burden of persuasion at trial, the movant can satisfy its summary judgment burden of production in either of two ways. The movant may submit evidence that negates an essential element of the nonmovant's claim, or it may show after a reasonable opportunity for discovery that the nonmovant's evidence is insufficient to establish an essential element of the nonmovant's claim. *See Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A conclusory assertion that the nonmovant has no evidence to support its claim will not satisfy the movant's summary judgment burden of production. *See id.* at 328 (White, J., concurring), 332 (Brennan, J., dissenting).

V. Trustee's Motion for Summary Judgment -- Trustee Liability

Ms. Coleman contends that the Trustee should be held personally liable for her actions. See Complaint ¶17, 151 - 154. The Trustee argues that all of her actions in this case fall within the scope of her statutory authority under the Bankruptcy Code, that she is immune from suit for conduct taken in her official capacity, and that Ms. Coleman has failed to present any material facts creating a genuine dispute. Although the Bankruptcy Code imposes specific duties on bankruptcy trustees, *see e.g.*, 11 U.S.C. §704[2], the Code does

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[2] Section 704 of the Bankruptcy Code outlines the duties of the Chapter 7 trustee. 11 U.S.C. §704. It provides that a trustee shall: (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest; (2) be accountable for all property received; (3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title; (4) investigate the financial affairs of the debtor; (5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper; (6) if

not explicitly make trustees liable for breach of those duties. The Court of Appeals for the Fourth Circuit has ruled on several occasions that trustees can only be held personally liable for injuries arising from "willful or intentional misconduct." *See Weiss v. First Citizens Bank & Trust Co.*, 111 F.3d 1159, 1168 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 369 (1997); *Yadkin Valley Bank & Trust Co. v. McGee*, 819 F.2d 74, 76 (4th Cir. 1987). *See also U.S. v. Sapp*, 641 F.2d 182, 184 (4th Cir. 1981).

The Trustee has moved for summary judgment and bears an initial burden of production, but it is Ms. Coleman that bears the burden of persuasion at trial. As a result, the Defendant's only burden after claiming the absence of an essential element of Plaintiff's claim, is to inform the court of the basis for its motion and to demonstrate that the record lacks substantial evidence to support a necessary element of the claim of the nonmovant, Ms. Coleman. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-326 (1986) (when defendant movant for summary judgment, who did not have the burden of persuasion at trial, specified absence of support for an essential element of the plaintiff nonmovant's claim, the court could grant summary judgment unless the plaintiff set forth facts requiring trial).

In this case, the Trustee has met her initial burden of proof with respect to Plaintiff's claims. She has presented evidence that every action Ms. Coleman complains of was taken in the course of performing her duties under the Bankruptcy Code. (*See Affidavit of Lori S. Simpson*, Plaintiff's Exhibit 1). The Trustee has further pointed out that Ms. Coleman lacks any evidence to support her allegations, especially in light of the

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advisable, oppose the discharge of the debtor; (7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest; (8) if the business of the debtor is authorized to be operated, file with the court...periodic reports and summaries...; and (9) made a final report and file a final account of the administration of the estate with the court and with the United States trustee.

broad protections afforded to trustees under the law. A breakdown of Ms. Coleman' s stated causes of action follows:

1. *Breach of Fiduciary Duty Resulting in Gross Negligence (Count I): Negligence Caused by Breach of Fiduciary Duty of Care to Protect Assets (Count IX); Gross Negligence in Bankruptcy Administration (Count XI)*

The Complaint alleges in Count I that the Trustee breached her fiduciary duties and that the breach "led Ms. Simpson to make egregious errors resultant in gross negligence." (*Complaint at* ¶20). Count IX of the Complaint alleges that the Trustee is liable for "Negligence and/or Breach of Fiduciary Duty to Care for Property Within the Trustee's Possession." (*Complaint at* ¶118-132). Count XI alleges that the Trustee is liable for "Gross Negligence in Bankruptcy Estate Administration." (*Complaint at* ¶142-150). Even if Ms. Coleman's allegations are true, as noted above, trustees can only be held personally liable for injuries arising from " ... willful or intentional misconduct." *See Weiss v. First Citizens Bank & Trust Co.*, 111 F.3d at 1168; *Yadkin Valley Bank & Trust Co. v. McGee*, 819 F.2d at 76. *See U.S. v. Sapp*, 641 F.2d at 184. Because the Trustee may only be held personally liable for injuries arising from willful or intentional misconduct, Ms. Coleman cannot prevail against the trustee on negligence actions.

The court acknowledges that Ms. Coleman has pled Count IX of her complaint in the alternative (i.e. "Negligence and/or Breach of Fiduciary Duty"); however, none of the allegations contained in the Complaint or in the materials submitted at the summary judgment phase allege that the Trustee acted willfully or intentionally. In any event, as discussed below, Ms. Coleman has failed to present admissible evidence to establish that genuine issues of material fact exist.

2. *Fraud by Negligent Misrepresentation (Count II)*

Recovery in a tort action for fraud or deceit in Maryland is based upon a defendant's deliberate intent to deceive. *See Ellerin v. Fairfax Savings Bank, F.S.B.*, 337 Md. 216 at 230-

31, 652 A.2d 1117 (1995). Misrepresentation induced by simple negligence or ignorance is not deceit. *Raymond International, Inc. v. Baltimore County*, 45 Md.App. 247, 412 A.2d 1296, *cert. denied*, 449 U.S. 1013 (1980). Therefore, even assuming the veracity of Ms. Coleman's allegations, "negligent misrepresentation(s)" cannot be the foundation for a claim of fraud. In addition, as discussed above, trustees cannot be held liable for negligent conduct, but may only be held personally liable for injuries arising from willful or intentional misconduct. Therefore, the Trustee is entitled to summary judgment on Count II of the Complaint.

3. *Misrepresentation (Count III)*

Ms. Coleman' s third stated cause of action is captioned misrepresentation; however, the allegations contained in the Complaint state the elements for intentional fraud. (See Complaint at ¶54). To recover damages for "fraud" or an overt, false representation, it must be shown that: (i) the defendant made a false representation of a material fact; (ii) the defendant knew of its falsity or made it with such reckless indifference to the truth that it would be reasonable to charge the defendant with knowledge of its falsity; (iii) the defendant intended that the plaintiff would act in reliance on such statements; (iv) plaintiff did justifiably rely on the representations of the defendant; and, (v) plaintiff suffered damages as a result of that reliance. *See Ellerin v. Fairfax Savinns Bank. F.S.B.*, 337 Md. 216, 652 A.2d 1117 (1995); *First Nat'l Bank. v. Burton, Parsons & Co.*, 57 Md. App. 437, 470 A.2d 822, *cert denied*, 300 Md. 88, 475 A.2d 1200 (1984).

Ms. Coleman claims that the Trustee intentionally made numerous false representations to the court, including (l) failing to disclose the Trustee's "participation with the Hydes in facilitating an Emergency Hearing; the material findings by the Trustee that provided the alleged 'exigent circumstances'; the hiring of an employee who had previously represented an adverse interest to the estate to which she was assigned, and who had a relationship with a creditor to the estate to which

she assumed control;" (2) "misrepresenting a document ($400,000.00 deposit slip)"; and (3) that the Trustee "falsified a court document (Application for Employment);" (*See Plaintiff's Motion for Summary Judgment* at 38).

Although Ms. Coleman's allegations may survive a motion to dismiss, at the Summary Judgment phase, she is obligated to come forth with evidence to support her claims and establish that genuine issues of material fact exist. In this case, Ms. Coleman has not presented any evidence to support her allegations, nor has she submitted an affidavit indicating evidentiary support. In addition, at her March 21 and 22, 2000 depositions, Ms. Coleman refused to provide any information about the basis for her allegations against the Trustee. See Defendant's Exhibit 2 at page 5, line 21 to page 7, line 11 ; page 8, line 20 to page 13, line 15. Although Ms. Coleman's Fifth Amendment privilege may shield her from answering questions that tend to incriminate her, one consequence that follows from her refusal to answer questions or to provide a proper affidavit is that she is unable to thwart the trustee's motion for summary judgment. The Court of Appeals for the Fourth Circuit has noted the difficult choice presented to a civil plaintiff such as Ms. Coleman who invokes her Fifth Amendment privilege:

> In many civil cases the burden placed on a person's silence may be unavoidable. Where a plaintiff has gathered sufficient evidence to establish a claim prior to discovery, a defendant who risks incrimination by speaking will inevitably face the choice of forsaking silence or losing a civil judgment, even if the defendant's silence is not used against him. *A plaintiff whose claim requires incriminating testimony will likewise always face the choice of speaking or forsaking his prayer for redress...*

In re Grand Jury Subpoena, 836 F.2d 1468, 1472 n.4 (4th Cir. 1988) (emphasis supplied). In this proceeding, the Trustee has presented significant facts to support its position. Ms. Coleman had a choice -- she could either take her chances on a judgment absent testimony, or she could defend

against the Trustee's motion by providing an affidavit. Ms. Coleman chose to assert her Fifth Amendment privilege, and she must live with the consequences of her decision if she could have provided facts to create a material issue.

4. *Fraud by Concealment or Deceit (Count IV): Fraud by Partial and Fragmentary Disclosure (Count VII)*

Count IV of the Complaint alleges that the Trustee is liable for committing "Fraud by Concealment or Deceit." (*Complaint* at ¶56-75). Count VII of the Complaint alleges that the Trustee is liable for committing fraud "by partial and fragmentary disclosure." (*Complaint* at ¶82-101). Under Maryland law, both of these actions fall under the tort of deceit, which is also called concealment or non-disclosure. The tort consists of the following five elements:

(1) Defendant owed a duty to plaintiff to disclose a material fact;

(2) Defendant failed to disclose that fact;

(3) Defendant intended to defraud or deceive plaintiff;

(4) Justifiably relying on the concealment, plaintiff takes action; and

(5)Plaintiff suffers damage from defendant's concealment.

See Lubore v. RPM Associates, 109 Md. App. 312, 330, 674 A.2d 547, 556 (1995); *Finch v. Hughes Aircraft Co.*, 57 Md. App. 190, 231-32, 469 A.2d 867 (1984); *Schnader v. Brooks*, 150 Md. 52, 57-58, 132 A. 381 (1926) (fraud may consist of the suppression of truth as well as the assertion of a falsity, where one owes a duty to speak).

Ms. Coleman has set forth in her Complaint and in her Motion for Summary judgment a number of reasons why she believes that the Trustee should be held liable under these counts. However, Plaintiff has not presented any evidence concerning the third element of this cause of action, i.e., that the Trustee intended to defraud or deceive the *plaintiff*. In addition, Ms. Coleman cannot meet her burden on the fourth element of this cause of action because she has only alleged that the *court* relied on the alleged concealment. (*See, e.g.*,

Plaintiff's Motion for Summary Judgment at 39). Ms. Coleman has not alleged, nor has she presented any evidence that she (the plaintiff) relied on the information allegedly concealed by the Trustee.

5. *Defamation (Count V)*

Count V of the Complaint alleges that the Trustee defamed Ms. Coleman. Under Maryland law, libel/slander is the publication of a false and defamatory statement about another which exposes that person to public scorn, hatred, contempt or ridicule thereby injuring that person's reputation or discouraging others from associating with that person and is communicated to a third person who reasonably recognizes the statement to be defamatory, thereby causing the defamed person to be damaged. *Mareck v. Johns Hopkins University*, 60 Md.App. 217, 482 A.2d 17 (1984), *cert, denied*, 302 Md. 288 (1985); *Gay v. William Hill Manor, Inc.*, 74 Md.App. 51, 536 A.2d 690, *cert denied*, 312 Md. 601 (1988).

The Complaint alleges that the Trustee defamed her by making statements "that [the Trustee] had written proof (a series of transactions) that showed Coleman was involved in a criminal scheme to divert creditor funds to hidden funds in family accounts," "that Ms. Simpson continued to make remarks to support her allegations, even after she realized that she had made a mistake," and that "Ms. Simpson communicated her assertions to the Court, to the Creditors, to the Press and to others ...." (*Complaint* at ¶78).

The Trustee is entitled to summary judgment on this count because (a) any allegedly defamatory statements made by the Trustee before the court, including but not limited to pleadings, motions and depositions are protected by Maryland's common law absolute privilege and (b) aside from the Trustee's in court statements, Ms. Coleman has not presented any admissible evidence that the Trustee made defamatory statements to creditors or to newspapers.

Maryland law provides several instances where a person is afforded an absolute privilege to make otherwise defamatory statements. An absolute privilege is a complete defense

regardless of the defendant's wrongful purpose, malice, knowledge or reasonableness of conduct. *Keys v. Chrysler Credit Corp.*, 303 Md. 397, 494 A.2d 200 (1985); *Sherrard v. Hull*, 53 Md.App. 553, 456 A.2d 59, aff'd, 296 Md. 189, 460 A.2d 601 (1983). One of these instances includes any statements made during the course of judicial proceedings where the court has jurisdiction. If the court has jurisdiction, the absolute privilege extends to judges, lawyers, witnesses and parties. *DiBlasio v. Kolodner*, 233 Md. 512, 197 A.2d 245 (1964) ("This absolute immunity extends to the judge as well as to witnesses and parties to the litigation, for defamatory statements uttered in the course of a trial or contained in pleadings, affidavits, depositions, and other documents directly related to the case."). There is no question that the court has jurisdiction over these proceedings, and therefore any allegedly defamatory statements made by the Trustee either before the court or in documents presented to the court are protected by the privilege.

6. *Invasion of Privacy by Placing: Plaintiff in False Light (Count VI)*

Count VI of the Complaint alleges that the Trustee committed the tort of Invasion of Privacy by placing Ms. Coleman in a false light. Invasion of Privacy is recognized as a separate tort. *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841 (1962). To state an actionable false light claim, a plaintiff must show: (1) publicity in a false light which a reasonable person would find highly offensive and (2) that the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter placing plaintiff in a false light. *See Bagwell v. Peninsula Reg'l Med. Ctr.*, 106 Md.App. 470, 665 A.2d 297 (1995), *cert. denied*, 669 A.2d 1360 (Md. 1996); *Pemberton v. Bethlehem Steel Corp.*, 66 Md.App. 133, 502 A.2d 1101, *cert. denied*, 306 Md. 289, 508 A.2d 488, *cert. denied*, 479 U.S. 984 (1986); RESTATEMENT (SECOND) OF TORTS §652E.

However, Ms. Coleman's invasion of privacy claim fails for the same reasons her defamation claims failed because

under Maryland law, "[r]egardless of whether a declaration is styled as a defamation action or an invasion of privacy action, the same considerations and legal standards apply." *AIDS Counseling & Testing Ctrs. v. Group W. Television. Inc.*, 903 F.2d 1000 at 1004 n. 1 (4th Cir. 1990) *quoting Phillips v. Washington Magazine, Inc.*, 58 Md.App. 30, 36 n.1,472 A.2d 98, 101 n.l, *cert. denied*, 300 Md. 89, 475 A.2d 1201 (1984); *see also Bagwell v. Peninsula Reg'l Med. Ctr.*, 106 Md.App. 470, 665 A.2d 297 (1995), *cert. denied*, 669 A.2d 1360 (Md. 1996) *citing Steer v. Lexleon. Inc.*, 58 Md.App. 199, 472 A.2d 1021 (1984) (privilege discussion applied identically to defamation and false light claims). Therefore, the Trustee may raise the same defenses to Ms. Coleman's invasion of privacy claim as the Trustee could raise to Ms. Coleman's defamation claim. And as discussed above, in a defamation action the Trustee has an absolute privilege for any statements she made during the course of judicial proceedings where the court has jurisdiction. Ms. Coleman has not presented any admissible evidence outside of statements made by the Trustee to the court or in documents presented to the court. Therefore, even construing the facts in a light most favorable to the Plaintiff, Ms. Coleman cannot prevail on her invasion of privacy claim, and the Trustee is entitled to summary judgment on Count VI of the Complaint.

7. *Perjury (Count VIII)*

Count VIII of the Complaint alleges that the Trustee "resorted to perjury" to prevent Ms. Coleman from "seeing her documents" and then compounded this alleged perjury by further concealing "her own mistake in misrepresenting information to creditors. . ." (*Complaint* at ¶102-117). Perjury is a crime in Maryland. *See* Md. Code Ann. Art. 27, §435 (1957, 1998 Repl.Vol.). The statute embodies the common law definition of perjury, and also enumerates specific instances that constituted the common law crime of false swearing. *Gatewood v. State*, 15 Md.App. 314, 290 A.2d 551 (1972). Perjury has been defined by Maryland courts to be committed when the following elements are met:

1. a lawful oath is administered;
2. in some judicial proceeding;
3. when a person swears wilfully, absolutely and falsely;
4. to a matter material to the issue or point in question.

See Smith v. State, 51 Md.App. 408, 443 A.2d 985 (1982); *State v. Levitt*, 48 Md.App. 1, 426 A.2d 383 (1981).

Whether the Trustee has committed criminal perjury is not relevant to these adversary proceedings. What is relevant is whether a cause of action exists for civil perjury. Ms. Coleman has not cited any authority other than Black's Law Dictionary to support her allegations that the Trustee may be held civilly liable for perjury. Nor does an analysis of Maryland law reveal any authority or basis for a civil perjury action. In *Schaub v. O'Ferrall*, 116 Md. 131, 81 A. 789 (1911), the plaintiff filed a complaint alleging that in a former action in which the plaintiff had participated as counsel, he had been damaged by false and perjured testimony concerning his supposed relationship with his then client, given as a result of a conspiracy by the present defendants. The Superior Court of Baltimore City sustained a demurrer to the complaint. The Maryland Court of Appeals affirmed the lower court's ruling, and relied on the rule making perjury by a witness in a judicial proceeding nonactionable, because public policy requires that a witness be free to speak without fear of harassment by suit. This rule was deemed applicable in *Schaub*, because an act which constituted no cause of action when done by one alone could not be made the ground of such action by alleging it to have been done by and through a conspiracy of several. In *Maicobo Investment Corp. v. Von Der Heide*, 243 F. Supp. 885, 892 (D.Md. 1965), the District Court cited *Shaub* (sic) for the proposition that "no recovery of damages will be allowed against one who obtained a judgment by means of perjured testimony."

Therefore, even assuming that all of Ms. Coleman's allegations are true and correct, since there is no cause of action in Maryland for civil perjury, the Trustee is entitled to

summary judgment on Count VIII of the Complaint.

8. *Misappropriation of Assets/Funds Causing Contractual Breach (Count X)*

Finally, Ms. Coleman has alleged in Count X of the Complaint that the Trustee is liable for "Misappropriation of Assets Causing Contractual Breach." (*Complaint* at ¶133-141). Ms. Coleman asserts that the Trustee is "guilty" of misappropriation because (1) she took possession of property belonging to Richard Coleman, Sr., Richard Coleman, Jr., and personal property of Monica Coleman that was exempt from the bankruptcy and (2) the seizure of these assets "prevented the Colemans from being able to pay rent, attorney fees and insurance...and...also cause further damage because many of the misappropriated assets were stolen and Ms. Simpson did not have insurance to pay for their replacement." (*Complaint* at ¶134).

The Trustee is entitled to summary judgment on Ms. Coleman's Misappropriation claim for several reasons. First, Ms. Coleman has not cited any authority to establish that Maryland even recognizes a civil tort recovery for misappropriation. Next, she has not presented any evidence to support her allegations – such as an affidavit. Nor has she testified to such. In addition, as discussed above, at her March 21 and 22, 2000 depositions, Ms. Coleman refused to provide any information about the basis for her allegations against the Trustee. *See* Defendant's Exhibit 2 at page 5, line 21 to page 7, line 11; page 8, line 20 to page 13, line 15. Again, while Ms. Coleman's Fifth Amendment privilege may shield her from answering questions that tend to incriminate her, one consequence that follows from her refusal to answer questions or to provide a proper affidavit is that she is unable to thwart the trustee's motion for summary judgment. Finally, even assuming Ms. Coleman had presented enough evidence to support her allegations, she has not presented any evidence that the Trustee committed any misconduct or that she did so willfully or intentionally. All of the actions Ms. Coleman has complained were taken within the scope of the Trustee's

authorized powers under the Bankruptcy Code.

VI. *Ms. Coleman's Motion for Summary Judgment.*

After examining all of the pleadings, motions, and supporting documentation and evidence presented by Ms. Coleman in response to the Trustee's motion and in support of her own motion for summary judgment, the record lacks any substantive evidence that the Trustee has acted outside the scope of her authority at all times relevant to this proceeding or that Ms. Coleman is otherwise entitled to any of the relief requested in the Complaint. Ms. Coleman has failed to present any evidence that the Trustee acted outside the scope of her authority or acted willfully or intentionally in violation of her official duties.[3] Ms. Coleman has therefore failed to set forth any specific facts showing that there is a genuine issue of material fact as required by Fed.R.Civ.P. 56(e).[4] Consequently, the Trustee is entitled to summary judgment as to all counts of the Complaint and Ms. Coleman's motion for summary judgment will be denied.

Therefore, it is, this 17th day of November, 2000, by the United States Bankruptcy Court for the District of Maryland, ORDERED, that Defendant's motion for summary judgment is GRANTED on all counts, and it is further ORDERED, that Plaintiff's motion for summary judgment is DENIED.

s/E. Stephen Derby
Judge

---

[3] *See* analysis in Section V-3 of this opinion.

[4] As the Supreme Court has stated, no genuine issue of material fact exists "unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986). "If the evidence is merely colorable...or is not significantly probative...summary judgment may be granted." *Id.* at 249-50; *Neufeld v. City of Baltimore*, 863 F.Supp. 255 (D.Md.1994), *affirmed* 70 F.3d 1262 (4th Cir. 1994), *certiorari denied* 517 U.S. 1222. (Mere scintilla of evidence in favor of nonmovant will not suffice to raise genuine issue of material fact for summary judgment purposes.).

APPENDIX 4

2402 Battersea Place
Suite 302
Baltimore, Maryland 21244
May 28, 2001

The Honorable Marvin J. Garbis
The United States District Court
of Maryland, Northern Division
101 West Lombard Street
Baltimore, Maryland 21201

Re: Appeal No. MJG-00-3788
Documents Listed On Designation of Records

Dear Judge Garbis:

I am writing to you regarding the designated records in the above-captioned case. At the time of the appeal from the U.S. Bankruptcy Court to the U.S. District Court, Karen Mitchell, the case administrator for the U.S. Bankruptcy Court, would not allow me to make copies of the records within the Designation Of Records, but instructed me that I would have to wait until it was recorded in the U.S. District Court, wherein she indicated to me that I would have to get the copies directly from the U.S. District Court.

On several occasions, I have requested a copy of the records listed within the Designation Of Records from Mary Star[r], the case administrator for the U.S. District Court. On each occasion, Ms. Star[r] has indicated that there is no record of the documents within the Designation Of Record in the file. However, Ms. Mitchell previously provided a transmittal sheet showing that they had been sent from the U.S. Bankruptcy Court to the U.S. District Court.

As you are probably aware, this case is now on appeal to the United States Court Of Appeals For The Fourth Circuit. And of course, I need a copy of these records for this appeal. Ms. Star[r] has indicated that she still has no

copy of these records, and that I should write to you to discern whether you have the records.

Therefore, could you please have someone from your office call me to let me know whether or not you have the records so that I may arrange to get a copy or attempt to make other arrangements to get the record. My telephone number is (410) 944-7487 or a message can be left at (410) 636-0588. Given the time limits on Appellate Procedures, your expeditious attention to this matter would be greatly appreciated.

Sincerely,
s/Monica Lynn Coleman, *pro se*

APPENDIX 5

FILED: October 29, 2001

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-2186
(CA-00-3788-MJG)

In Re: MONICA LYNN COLEMAN;
In Re: COLEMAN CRATEN, LLC,
Debtors

MONICA LYNN COLEMAN,
Plaintiff - Appellant,
versus
LORI SIMPSON, Trustee,
Defendant - Appellee.

ORDER

Appellant has filed a pro se motion to stay proceedings pending resolution of designated record. Appellant has also filed a pro se motion to file a formal brief.

The Court denies appellant's pro se motion to stay proceedings as moot. The record on appeal was filed with the Clerk's office on October 19, 2001. The Court denies appellant's pro se motion to file a formal brief.

For the Court - By Direction

/s/ Patricia S. Connor
Clerk

APPENDIX 6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: COLEMAN CRATEN, LLC
Debtor

MONICA LYNN COLEMAN
Appellant

vs. * CIVIL ACTION NO. MJG-01-644

LORI S. SIMPSON, CHARTER 7 TRUSTEE
Appellee

MEMORANDUM AND ORDER

The Court has before it the Motion for Leave to Appeal filed by Debtor Monica Lynn Coleman ("Coleman") and the materials submitted relating thereto. The Court finds that a hearing is unnecessary.

On February 12, 2001, Judge Derby of the Bankruptcy Court issued an Order granting Rule 2004 (Federal Bankruptcy Rules) Examinations of Allfirst Bank and the law firm of Wilson, Esler, Moskowitz, Edelman & Dicker, LLP. Coleman seeks leave to appeal from this interlocutory order. Coleman objects to the Examination because of the existence of pending adversary proceedings.

As stated by Judge Spencer in *KPMG Peat Marwick. L.L.P. v. Estate of Nelco, Ltd., Inc.*, 250 B.R. 74, 78 (E.D. Va. 2000):

> Federal district courts are empowered to "hear appeals from final judgments, orders, and decrees, and with leave of court, from interlocutory orders and decrees, of bankruptcy judge...." 28 U.S.C. § 158(a). Non-final orders or decrees are not

> appealable as a matter of right, however.
>
> In seeking leave to appeal an interlocutory order or decision, the appellant must demonstrate "that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after he entry of a final judgment." ... When deciding whether to grant leave to appeal an interlocutory order of decree of a bankruptcy court, the district court may employ an analysis similar to that applied when certifying interlocutory review by the circuit court of appeals under-28 U.S.C. § 1292(b). ... Under this analysis, leave to file an interlocutory appeal should be granted only when 1) the order involves a controlling question of law, 2) as to which there is substantial ground far a difference of opinion, and 3) immediate appeal would materially advance the termination of the litigation.

Of course, "the decision whether to grant leave to appeal from a bankruptcy court's interlocutory order is committed to the district court's discretion." *In re The Wallace & Gale Co.*, 72 F.3d 21, 25 (4th Cir. 1995)

The Orders here at issue can be said to involve a controlling question of law in that they are dependent upon the authority of the bankruptcy court to permit a Rule 2004 Examination while adversary proceedings are pending.

It is doubtful that there is substantial ground for a difference of opinion as to the precise question here presented inasmuch as the parties subject to the Rule 2004 Examination are not parties tor or interested inl any adversary proceeding. *See In re The Bennett Funding Group. Inc.*, 203 B.R. 24, 28-29 (N.D.N.Y. 1996)

In any event, an immediate appeal would not materially advance the termination of the litigation. Indeed, it appears probable that allowing an interlocutory appeal would serve to delay and/or obstruct efforts to ascertain relevant facts.

Finally, it appears unlikely that Coleman even has standing to pursue an appeal from the Order at issue. *see In re Paine*, 250 B.R. 99, 104 (BAP 9th Cir. 2000)

In sum, it is most doubtful that the Court properly could grant Coleman leave to appeal from the Order at issue. Even if it were proper to do so, the Court would not exercise its discretion to grant an interlocutory appeal.

Accordingly:

1. Motion for Leave to Appeal filed by Debtor Monica Lynn Coleman is DENIED.
2. This case is DISMISSED.
3. The Clerk shall CLOSE THE FILE.

SO ORDERED this 21st day of March, 2001.

s/Marvin J. Garbis
United States District Judge

APPENDIX 7

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1465

In Re: COLEMAN CRATEN, LLC;
MONICA LYNN COLEMAN,
Debtors.

MONICA LYNN COLEMAN,
Plaintiff - Appellant,
versus
LORI S. SIMPSON, Chapter 7 Trustee,
Defendant - Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Marvin J. Garbis, District Judge. (CA-O1- 644-MJG, BK-99-56381, AP-99-56239-SD)

Submitted: August 23, 2001 Decided: August 29, 2001
Entered August 29, 2001

Before WILKINS and KING, Circuit Judges, and HAM I LTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Monica Lynn Coleman, Appellant Pro Se.
Kevin Gerald Hroblak,WHITEFORD, TAYLOR ~ PRESTON, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c)

PER CURIAM:

Monica Coleman appeals from the district court's order dismissing as interlocutory her appeal from the bankruptcy court's order granting Bankruptcy Rule 2004 examinations of certain third-parties. Our review of the record and the district court's opinion discloses no reversible error. Accordingly, we affirm on the reasoning of the district court. Coleman v. Simpson, Nos. CA-01-644-MJG; BK-99-56381; AP-99-56239-SD (D. Md. Mar. 22, 2001) . We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX 8

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED November 14, 2001

No. 01-1465
AP-99-56239-SD
BK-99-56381
CA-01-644-MJG

In Re: COLEMAN CRATEN, LLC;
MONICA LYNN COLEMAN
Debtors

MONICA LYNN COLEMAN
Plaintiff - Appellant
v.
LORI S. SIMPSON, Chapter 7 Trustee
Defendant - Appellee

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,
/s/ Patricia S. Conner
CLERK

APPENDIX 9

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: MONICA LYNN COLEMAN
Debtor
MONICA LYNN COLEMAN
Appellant
v. Civil #L-00-3634
LORI S. SIMPSON
Appellee

ORDER

On November 20, 2000, the United States Bankruptcy Court (Judge E. Stephen Derby) issued a Memorandum Opinion and Order Granting in Part and Denying in Part Trustee's Motion to Compel. On December 14, 2000, the Debtor, Monica Lynn Coleman filed a Motion for Leave to Appeal. The motion, which the Chapter 7 Trustee, Lori S. Simpson, has opposed, has been fully briefed, so no hearing is necessary. Local Rule 105.6 (D. Md. 1999) For the reasons stated herein, Ms. Coleman's Motion for Leave to Appeal is DENIED.

While Ms. Coleman's motion complains generally about Ms. Simpson, it raised two points: (i) that Judge Derby improperly combined her Rule 2004 examination and adversary proceeding into an omnibus examination, and (ii) Judge Derby improperly ruled that Ms. Coleman could not assert the Fifth Amendment in a blanket fashion, but must appear for a hearing to clarify her fear of prosecution on a question by question basis. Ms. Coleman's arguments must fail. Judge Derby has full authority to set the terms and conditions of a Rule 2004 examination. Moreover, as the Trustee points out, Ms. Coleman herself agreed to the omnibus examination as a means of saving time.

Judge Derby also has full authority to examine Ms. Coleman's Fifth Amendment assertions on a question by question basis. In his Memorandum Opinion, Judge Derby correctly and thoroughly examines the Fifth Amendment issues. While Ms. Coleman faces potential criminal prosecution for her activities at Coleman Craten, LLC, it is apparent that she has claimed the privilege in response to questions that could not possibly tend to incriminate her. At the hearing, Judge Derby will be able to decide which questions Ms. Coleman must answer and which questions she may constitutionally decline to answer.

Accordingly, the MOTION FOR LEAVE TO APPEAL is hereby this 30th day of March, 2001, DENIED.

s/Benson Everett Legg
United States District judge

APPENDIX 10

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1490

In Re: COLEMAN CRATEN, LLC;
MONICA LYNN COLEMAN,
Debtors.

MONICA LYNN COLEMAN,
Plaintiff - Appellant,
versus
LORI S. SIMPSON,
Defendant - Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Benson E. Legg, District Judge. (CA-O1- 3634-L, BK-99-56239-SD, AP-99-56381-SD)

Submitted: August 23, 2001 Decided: August 29, 2001

Before WILKINS and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Monica Lynn Coleman, Appellant Pro Se.
Kevin Gerald Hroblak, WHITEFORD, TAYLOR & PRESTON, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c)

PER CURIAM:

Monica Coleman appeals from the district court's order denying her motion for leave to appeal the bankruptcy court's order granting in part and denying in part the trustees' motion to compel. Our review of the record and the district court's opinion discloses no reversible error. Accordingly, we affirm on the reasoning of the district court. Coleman v. Simpson, Nos. CA-01-3634-L; BK-99- 56239-SD; AP-99-56381-SD (D. Md. filed Mar. 30, 2001; entered Apr. 2, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX 11

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED November 14, 2001

No. 01-1490
AP-99-56381-SD
BK-99-56239-SD
CA-01-3634-L

In Re: COLEMAN CRATEN, LLC;
MONICA LYNN COLEMAN
Debtors

MONICA LYNN COLEMAN
Plaintiff - Appellant
v.
LORI S. SIMPSON
Defendant - Appellee

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,
/s/ Patricia S. Conner
CLERK

No. 02-744

DEC 18 2002

IN THE

Supreme Court of the United States

MONICA LYNN COLEMAN

Petitioner,

v.

LORI S. SIMPSON, Trustee

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KEVIN G. HROBLAK
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I.
STATEMENT OF THE CASE

On May 7, 1999, Monica Lynn Coleman ("Petitioner" or "Ms. Coleman") filed a Voluntary Petition for relief under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Maryland (the "Bankruptcy Court"). On May 11, 1999, Coleman Craten, LLC ("Coleman Craten"), a company controlled by Ms. Coleman, filed a Voluntary Petition for relief under Chapter 11 of the Bankruptcy Code. On May 13, 1999, the Bankruptcy Court entered an Order converting Coleman Craten's bankruptcy case to a case under Chapter 7 of the Bankruptcy Code. Lori S. Simpson ("Trustee" or "Respondent") was appointed by the Office of the United States Trustee to serve as the Chapter 7 trustee in both the Coleman Craten and the Monica Lynn Coleman cases, which are jointly administered pursuant to an Order of the Bankruptcy Court.

The underlying adversary proceeding arises from the Petitioner's Complaint against the Trustee, filed on September 10, 1999, in which Petitioner alleged various tort claims. During the discovery phase of the case, the Trustee deposed Ms. Coleman. In response to each substantive question asked of her during the deposition, Ms. Coleman asserted the Fifth Amendment privilege against self-incrimination. As a result, on July 28, 2000, the Trustee filed a Motion for Summary Judgment and Memorandum of Law in support thereof (the "Trustee's Motion") requesting that the Bankruptcy Court issue an order granting summary judgment in favor of the Trustee. The Trustee's Motion was supported by affidavit and sworn testimony before the Bankruptcy Court. On July 31, 2000, Petitioner filed a

"Corrected Preliminary Dispositive Motion: Motion for Summary Judgment on the Pleadings," which was inadequately supported and merely restated the allegations contained in the initial pleadings. On November 20, 2000, the Bankruptcy Court entered a Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment.

On December 1, 2000, Petitioner filed her Notice of Appeal to the United States District Court for the District of Maryland (the "District Court"). Following the submission of briefs to the Honorable Marvin J. Garbis, and subsequent oral argument, Judge Garbis issued a Decision on Appeal and an Order Affirming Bankruptcy Court.

Ms. Coleman then filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit (the "Court of Appeals"). The parties submitted informal briefs. On March 27, 2002, the Court of Appeals affirmed the decision of the District Court in an unpublished *per curium* opinion. Further, the Court of Appeals denied: (1) Petitioner's request to submit a formal brief; (2) Petitioner's Motion to Stay Proceedings; and (3) Petitioner's Writ of Mandamus. On June 25, 2002, Ms. Coleman filed a Petition for Writ of Certiorari in this Honorable Court.

II.
STATEMENT OF THE FACTS

Due to the Petitioner's inclusion of facts not properly before the lower courts, and the misstatement of certain other facts, the Respondent states as supported by the facts below:

Lori S. Simpson, the Trustee, was duly appointed to serve as the Chapter 7 trustee in both of the above-referenced bankruptcy cases. Thereafter, pursuant to her duties under the United States Bankruptcy Code, the Trustee began investigating the assets, businesses, and other financial affairs of the Petitioner. The Trustee hired counsel and an asset manager to assist her with the administration of the Estate of Monica Lynn Coleman (the "Coleman Estate").

In furtherance of her administration of the Coleman Estate, the Trustee commenced her duties under the Bankruptcy Code and inspected, secured and collected assets of the Coleman Estate. These assets included two residences. Based upon the circumstances of her administration, the Trustee believed that the residences had been abandoned and the existence of conduct to conceal and deplete assets of the Coleman Estate was likely. Accordingly, the Trustee contacted the United States Office of the Trustee and alerted its attorneys to what she viewed as suspicious circumstances, including a possible plan to hide and conceal assets. That same day, James R. and Carol Hyde (together, "the Hydes"), creditors of the Coleman Estate and the Estate of Coleman Craten, LLC (collectively, the "Estates"), filed an emergency motion to convert the Coleman Craten bankruptcy case to Chapter 7. The United States Trustee filed a concurrence. The Trustee appeared as a witness so that she could inform the Bankruptcy Court of what she discovered during her administration, and to seek guidance from the Bankruptcy Court as to any appropriate action. Based on the testimony provided, the Bankruptcy Court converted the Coleman Craten case to Chapter 7 on May 13, 1999. Lori Simpson was subsequently appointed as the Trustee in the Coleman Craten case.

Notwithstanding that all of the Trustee's actions were taken in the course of performing her duties under the Bankruptcy Code, on or about September 10, 1999, Ms. Coleman initiated an adversary proceeding against the Trustee by filing a Complaint in the Bankruptcy Court alleging: (1) Breach of fiduciary duty resulting in gross negligence; (2) Fraud by negligent misrepresentation; (3) Misrepresentation; (4) Fraud by concealment or deceit; (5) Defamation; (6) Invasion of privacy by placing Plaintiff in false light; (7) Fraud by partial and fragmentary disclosure; (8) Perjury; (9) Negligence caused by breach of fiduciary duty of care to protect assets; (10) Misappropriation of assets/funds causing contractual breach; and (11) Gross negligence in bankruptcy administration.

As stated above, the Trustee deposed Ms. Coleman; however, she asserted the Fifth Amendment privilege to virtually all questions asked of her. As a result of the inability to obtain discovery information from Ms. Coleman, in conjunction with her deficient pleading, the Trustee submitted a Motion for Summary Judgment (the "Trustee's Motion"). Ms. Coleman submitted a cross-motion for summary judgment ("Ms. Coleman's Motion"). On or about November 20, 2000, the Trustee's Motion was granted and Ms. Coleman's Motion was denied. These decisions are the basis for Ms. Coleman's appeal to the District Court, Court of Appeals, and the filing of the instant Petition for Writ of Certiorari.

III.
REASONS FOR DENYING THE PETITION

A. Certiorari is Unwarranted Because Neither the Record nor the Decision Below Raise Certain Issues Presented by Petitioner.

The case below presented a basic question on the appeals: Whether the Bankruptcy Court erred in granting summary judgment in favor of the Trustee based upon, in part, immunity granted to her for actions taken in administering the Estates. The District Court and Court of Appeals answered this question in the negative.

Certain of the questions presented by the Petitioner, however, stray from the issues reviewed below. For instance, the Petitioner now seeks review of questions relating to the constitutionality of the Trustee's conduct and the ability of a trustee to collect and administer assets given the constraints of the Fourth Amendment to the Constitution. Moreover, the Petitioner seemingly seeks review of the lower courts' findings relating to the assertion of the Fifth Amendment privilege. Lastly, in a one paragraph unsupported recital, Ms. Coleman calls into question the abilities of the lower courts in applying law to the facts of this case. As explained below, however, none of these issues were presented to the Court of Appeals for consideration.

1. The Bankruptcy Proceeding

In the Bankruptcy Court, Petitioner argued that "[t]he basis of this case is that the Trustee acted outside of the scope of her authority . . . ." (Petitioner's Preliminary Answer to

Trustee's Request for Summary Judgment, at 2.) At no point in the bankruptcy pleadings did Ms. Coleman assert that the Trustee had violated her Fourth Amendment rights or performed an illegal search and seizure.

In granting summary judgment, the Bankruptcy Court concluded that the Trustee had presented sufficient evidence that she had carried out her actions in the course of performing her duties under the Bankruptcy Code. Ms. Coleman's claims of Breach of Fiduciary Duty Resulting in Gross Negligence, Negligence Caused by Breach of Fiduciary Duty of Care to Protect Assets, and Gross Negligence in Bankruptcy Administration were, therefore, invalid.

The Bankruptcy Court was similarly able to grant judgment in favor of the Trustee on counts alleging misrepresentation based on Ms. Coleman's failure to present sufficient evidence to support those claims. In reviewing these claims, the Bankruptcy Court addressed the Petitioner's assertion of the Fifth Amendment, noting that a party may not simultaneously use the Fifth Amendment privilege as a shield from questions that might incriminate her and as a sword to overcome the significant burden on a summary judgment motion.

In addressing Ms. Coleman's Defamation and Invasion of Privacy claims, the Bankruptcy Court examined the absolute privilege afforded to persons making statements during the course of judicial proceedings over which the court has jurisdiction. Because the allegedly defamatory statements were made by the Trustee before the Bankruptcy Court, or in documents presented to the Bankruptcy Court, it concluded that the privilege applied and that summary

judgment was proper. With respect to Ms. Coleman's claims for perjury and misappropriation, the Bankruptcy Court recognized that no such claims exist under Maryland state law, and in any event, were unsubstantiated.

2. The Appeal to the District Court

On appeal to the District Court, Petitioner asserted that the Bankruptcy Court improperly granted summary judgment in favor of the Trustee. First, Ms. Coleman argued that the Trustee acted outside of the scope of her duties and challenged whether the Trustee had met her burden in seeking summary judgment. Next, Ms. Coleman asserted that the Bankruptcy Court committed reversible error by raising issues *sua sponte*. Further, Ms. Coleman asserted that the Bankruptcy Court improperly excluded her evidence from consideration. Lastly, Ms. Coleman challenged the Bankruptcy Court's analysis of her Fifth Amendment privilege. At no point in her brief did the Petitioner assert that the Trustee's actions constituted an improper search and seizure or a violation of the Fourth Amendment to the United States Constitution.

In affirming the Bankruptcy Court, the District Court agreed with the Bankruptcy Court that the claims by the Petitioner were couched as claims against the Trustee personally and not in her official capacity and thus, summary judgment was appropriate as the only evidence presented established that the actions complained of were carried out within the scope of her duties as a trustee.

The District Court also briefly addressed Ms. Coleman's contention that the Bankruptcy Court punished her for exercising her Fifth Amendment privilege against self

incrimination. It concluded that based upon well-established law, while "a Plaintiff can assert her Fifth Amendment privilege, she still must rebut a motion for summary judgment by presenting admissible evidence sufficient to establish genuine issues of material fact." The judgment of the Bankruptcy Court was thus affirmed.

3. The Appeal to the Court of Appeals

On appeal to the Court of Appeals, the Petitioner presented an unsubstantiated allegation that the District Court did not have the record of the case at the time of its decision. Additionally, Petitioner claimed that the Bankruptcy Court raised issues *sua sponte* and failed to provide her with an opportunity to cure a defect in her pleading. Lastly, Petitioner challenges the interpretation of case law and its application to the facts of the instant case. Again, Petitioner did not reference any alleged violation of the Fourth Amendment or illegal searches and seizures. Finding no reversible error, the Court of Appeals affirmed based upon the reasoning of the District Court.

It is well settled that, generally, issues may not be raised for the first time on review to the United States Supreme Court. *See Kosak v. United States*, 465 U.S. 848, 850 n.3, 104 S. Ct. 1519, 1522 n.3, 79 L. Ed. 2d 860, 865 n.3 (1984) (concluding, "Because petitioner did not present this argument to the Court of Appeals, we decline to consider it."); *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6, 103 S. Ct. 2209, 2212 n.6, 76 L. Ed. 2d 387, 392 n.6 (1983) (declining to address an issue that had not been raised in the district court or the court of appeals); *United States v. Lovasco*, 431 U.S. 783, 788 n.7, 97 S. Ct. 2044, 2048 n.7, 52 L. Ed. 2d 752, 758 n.7 (1977) (explaining that absent exceptional

circumstances, the Court will decline to review issues not raised in the district court or court of appeals). Three factors are utilized in determining whether a new issue should be reviewed. *See Standard Indus., Inc. v. Tigrett Indus., Inc.*, 397 U.S. 586, 587, 90 S. Ct. 1310, 1311, 25 L. Ed. 2d 590, 591 (1970) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 1466 (1938)). The inquiry focuses on whether there has been a significant change in the law since trial, whether the assertion below would have been futile, and whether an important public interest is served by reviewing the issue. *See id.* Petitioner does not allege a change in the law to warrant review of newly-raised issues. Moreover, the assertion of Constitutional arguments below would have yielded the same result and there is no overwhelming public interest served by a review of the newly-presented issues in this case. Review by this Court of the newly-presented questions is, therefore, not warranted.

B. Assuming Petitioner's Issues are Properly Presented, Certiorari is Unwarranted Because Petitioner's Questions Do Not Rise to a Level of Substantiality for This Court's Review

The Petition represents a transparent attempt to present unique and different theories on which the Petitioner may gain yet another review of her claims. The Petitioner's existing and newly-asserted claims, however, are meritless. The Petitioner's questions do not rise to the level of substantiality for this Court's review as set forth in Supreme Court Rule 10. For instance, the law with respect to the asserted issues is: (1) not in conflict among courts of appeals; (2) does not present an important federal question that conflicts with a state court of last resort, and (3) does not represent a departure from accepted and usual course of judicial proceedings. Moreover, the issues do not have far

reaching impact to warrant the granting of a writ of certiorari. Accordingly, further review is unwarranted.

1. Petitioner's Perceived Conflict of Law Relating to a Bankruptcy Trustee's "Search and Seizure" and the Impact on Constitutional Rights Does Not Exist

Petitioner claims that her Petition should be granted because various decisions, including one from this Court, two from state courts, one from a court of appeals, one from a district court, and one from a bankruptcy court, relating to her newly-created constitutional search and seizure issues are in conflict with each other. Specifically, Ms. Coleman contends that *Kane v. Smith*, 355 P.2d 827 (Wash. 1960), *United States v. Masterson*, 383 F.2d 610 (2d Cir. 1967), *Bivens v. Six Unknown Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), and *In re Barman*, 252 B.R. 403 (Bankr. E.D. Mich. 2000) impact the determination of whether a bankruptcy trustee may conduct a "search and seizure" without a court order and whether a trustee may waive Constitutional rights and privileges of a debtor. *See* Pet. at 15-24.

With respect to whether a bankruptcy trustee may waive a Constitutional right and privilege of a debtor, Ms. Coleman cites only *United States v. Patrick*, 916 F. Supp. 567, 571-72 (N.D.W.V. 1996) and *In re Application of Trustee in Bankr. For Search Warrant*, 173 B.R. 341 (N.D. Ohio 1994). The cases cited by Petitioner in support of her constitutional contentions do not represent a conflict of law, let alone a conflict among courts of appeals or between the

Court of Appeals and a state court of last resort pursuant to SUP. CT. R. 10.[1]

In support of her Petition, Ms. Coleman clearly misconstrues these cases as being relevant to the instant case and disingenuously attempts to create a conflict among the cited cases. For instance, Petitioner describes *Kane* as a case requiring a trustee to utilize turnover procedures to administer assets of a debtor. *See* Pet. at 17. The Supreme Court of Washington, however, analyzed whether a turnover order obtained by a trustee can be enforced in state courts following an order dismissing the bankruptcy. *See Kane*, 355 P.2d at 831. It did not address the myriad of ways or in any way limit the methods by which trustee can fulfill her duties of collecting and administering property of a debtor's estate.

With respect to *Masterson*, the two issues presented were whether there was sufficient evidence to convict a defendant of a crime and whether certain evidence should have been suppressed from a criminal trial. *See Masterson*, 383 F.2d at 611. The Court of Appeals for the Second Circuit refused to address the suppression issue as the appellant failed to adequately establish standing to challenge the alleged search and seizure. *See id.* at 613. Petitioner attempts to distort the ruling in an effort to create an inconsistency with *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971). In *Bivens*, however, this Court did not address the issues presented in *Masterson*. Nor did this Court evaluate a trustee's liability for collecting assets of a debtor who had filed a voluntary petition and consented to the

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[1] Even if a conflict existed among the cases cited by Ms. Coleman, a conflict among the jurisdictions deciding such cases would not rise to the level of substantiality for review by this Court. *See* SUP. CT. R. 10.

turnover of her assets, as is the case here. *Bivens* also failed to address the immunity for public officials. Indeed, the *Bivens* Court expressly declined to address such argument. *See id.* at 397-398 (explaining that the immunity issue was not addressed by the court of appeals). There is no rationale relationship between the criminal suppression case and the civil liability case. There is no issue presented here that rises to the necessary level for review by this Court.

Petitioner cites *In re Barman*, 252 B.R. 403, 404 (Bankr. E.D. Mich. 2000) as her last authority on the "search and seizure" issue and provides a lengthy interpretation of the holding. She concludes that if the Bankruptcy Court in Maryland applied the law promulgated by the Eastern District of Michigan then "the respondent could not have prevailed." This argument is not a proper basis for review by this Court.

Even if the *Barman* decision somehow was controlling on the Bankruptcy Court below, the *Barman* Court holds that although a debtor has a diminished expectation of privacy due to the bankruptcy filing, a debtor maintains some reasonable expectation of privacy in his or her residence. *See Barman*, 252 B.R. at 415. It is important to note that the Court recognized that in certain instances, a debtor cannot "expect to be free from intrusions by the trustee, who is entitled to possession of the bankrupt's property." *Id.* at n.10 (citing *Wade v. Smith*, 1991 U.S. Dist. Lexis 21787, 1991 WL 504873, at *6 (S.D. Ind. 1991)); *Masterson*, 383 F.2d at 613. This reference implies that the determination is factual in nature. In the instant case, however, there has never been a factual determination of these issues. This forum is not a proper place for an initial determination of facts. Further, the case is inapposite

because it did not analyze the potential liability and defenses, including immunity, for a trustee's conduct.

With respect to the argument relating to whether a bankruptcy trustee may waive a Constitutional right of a debtor, namely the Fourth Amendment right prohibiting illegal search and seizures, Ms. Coleman cites *Patrick*, which allowed a trustee to consent to a search of a corporate debtor's property, *see Patrick*, 916 F. Supp. at 571-72, and *In re Application of Trustee*, which held that a bankruptcy trustee was not a law enforcement officer or an attorney for the government and, thus, was not authorized to have a search warrant issued. *See In re Application of Trustee*, 173 B.R. at 342. Neither of these cases relate to the Petitioner's question presented which is reworded for clarity by the Respondent as follows: Whether a bankruptcy trustee can waive an *individual* debtor's Constitutional rights. Petitioner has overlooked the distinction.

In sum, by contrasting the highly distinguishable cases cited in the Petition, Ms. Coleman improperly creates the impression that confusion and substantial conflict exists among the courts with respect to a trustee's conduct. This simply is not the case. Moreover, Ms. Coleman's citation to cases of different jurisdictions and her failure to present court of appeal cases that are in conflict "on the same important matter," should be fatal. Additionally, Ms. Coleman's review of the underlying facts coupled with her misplaced analyses are improper at this stage of judicial review. By any analysis, this case raises no significant issue of law that warrants this Court's review.

2. Petitioner's Request for Clarity on Her Interpretation of Case Law Does Not Present a Far-Reaching Principle Warranting Consideration.

The Petitioner essentially asks this Court to provide clarification on its rulings in two cases: *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 105 S. Ct. 1986, 85 L. Ed. 2d 372 (1985) and *Mosser v. Darrow*, 341 U.S. 267, 71 S. Ct. 680, 95 L. Ed. 927 (1951). Specifically, Ms. Coleman petitions for a writ of certiorari to ask this Court to explain the limits on the "wide discretion" *dicta* in *Weintraub*, to clarify whether lower courts may rely upon *Weintraub* to provide immunity to trustees, and to confirm whether a bankruptcy trustee is entitled to define his or her "scope of duty." Pet. at 25.

The Petitioner seemingly interprets the two cases to illustrate conflicting standards for imposing liability for bankruptcy trustees. *See* Pet. at 25. These rulings, however, do not conflict. Indeed, Petitioners have failed to establish any relationship between the holdings of the cases, other than to tenuously assert that both *Weintraub* and *Mosser* address issues related to bankruptcy trustees.

In *Mosser,* this Court addressed whether a trustee, who knowingly permitted his employees to profit from trading in securities of the debtors' subsidiaries, could be held personally liable even though the trustee did not personally profit from his employees' transgressions. *See Mosser*, 341 U.S. at 268, 71 S. Ct. at 681, 95 L. Ed. at 930. Reversing the decision of the appellate court, which applied principles of negligence, this Court concluded that an evaluation of negligence principles was misplaced because the conduct clearly rose to the level of willful and deliberate.

See id. at 272, 71 S. Ct. at 682, 95 L. Ed. at 932. The Court held that the trustee was liable for the actions committed by his employees because he "knowingly authorized" the conduct causing harm. In recognizing the knowledge of the trustee, the Court did not need to evaluate whether the trustee would have been liable for negligent conduct. *See id.*

In a wholly unrelated opinion, the *Weintraub* Court concluded that a bankruptcy trustee had the power to waive the attorney-client privilege of a corporate debtor.[2] *See Weintraub*, 471 U.S. at 354. Petitioner, however, cites this case as promulgating a "wide discretion" rule for evaluating the conduct of a trustee. This interpretation is wholly unsound. Moreover, Petitioner contends that "this ruling opened a Pandora's box leading to inconsistent rulings amongst the jurisdictions regarding what a trustee is allowed to do," *see* Pet. at 26; however, she fails to cite a single case that would represent an inconsistent decision.

In short, Petitioner fails to present an inconsistent or unclear position reflected in either *Mosser* or *Weintraub*. Although both cases address issues relating to a trustee's roles, they hardly stand in contrast to each other. Contrary to Petitioner's assertions, the United States courts are not in a state of confusion in their attempts to reconcile the decisions. Petitioner has failed to present a significant issue that has far-reaching implications and, for the reasons stated above, the Respondent requests that the Court deny Petitioners request for a writ of certiorari.

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[2] The Court specifically stated that it was not addressing whether the holding applies to an individual in bankruptcy, as is the case here. *See Weintraub*, 471 U.S. at 356.

3. The Limits Placed on a Civil Litigant's Right to Invoke the Fifth Amendment Privilege Against Self-Incrimination in a Self-Serving Manner Are Well Settled.

In granting summary judgment in favor of the Trustee, the Bankruptcy Court noted that Ms. Coleman was required to present evidence to establish the existence of material facts in order to survive a motion for summary judgment. Because she had failed to present such evidence, regardless of her rationale for so declining, the Bankruptcy Court ruled in favor of the Trustee. Relying on well-settled case law, the Bankruptcy Court ultimately concluded as follows:

> Although Ms. Coleman's Fifth Amendment privilege may shield her from answering questions that tend to incriminate her, one consequence that follows from her refusal to answer questions or to provide a proper affidavit is that she is unable to thwart the trustee's motion for summary judgment. The Court of Appeals for the Fourth Circuit has noted the difficult choice presented to a civil plaintiff such as Ms. Coleman who invokes her Fifth Amendment privilege:
>
> > In many civil cases the burden placed on a person's silence may be unavoidable. Where a plaintiff has gathered sufficient evidence to establish a claim prior to discovery, a defendant who risks incrimination by speaking will inevitably face the choice of forsaking silence of losing

> a civil judgment, even if the defendant's silence is not used against him. *A plaintiff whose claim requires incriminating testimony will likewise always face the choice of speaking or forsaking his prayer for redress.*
>
> *In re Grand Jury Subpoena*, 836 F.2d 1468, 1472 n.4 (4th Cir. 1988) (emphasis supplied).

Bankruptcy Court Opinion (Pet. App. 3 at 51).

The decision rendered in *In re Grand Jury Subpoena* represents the general consensus of the courts of appeals on the issue of a civil litigant's right to invoke the Fifth Amendment. *See, e.g., United States v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir. 1990) (affirming grant of summary judgment when defendant invoked Fifth Amendment privilege); *United States v. 4003-4005 5th Ave.*, 55 F.3d 78, 85 (2nd Cir. 1995); *In re Edmond*, 934 F.2d 1304, 1308 (4th Cir. 1991) (holding that a district court is justified in striking an affidavit when a party has selectively asserted "his Fifth Amendment privilege . . . as a shield to oppose depositions while discarding it for the limited purpose of making statements to support a summary judgment motion."); *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084, 1087 (5th Cir. 1979) (cautioning that the trial court should guard against allowing the parties to use the Fifth Amendment shield as a sword); *Kisting v. Westchester Fire Ins. Co.*, 416 F.2d 967 (7th Cir. 1969); *Lyons v. Johnson*, 415 F.2d 540 (9th Cir. 1969) (dismissing plaintiff's claims as a result of her blocking the defendant's discovery by asserting the Fifth Amendment privilege).

Based on this well-settled tenet of law, the Bankruptcy Court correctly prevented Ms. Coleman from using the privilege as both an offensive and defensive tactic. Because the ruling of the Bankruptcy Court, which was affirmed by the District Court and Court of Appeals, does not conflict with other rulings addressing the issue, review by this Court is unwarranted.

Petitioner also argues on this matter that the Bankruptcy Court was required to inform her that her continued assertion of the Fifth Amendment privilege would lead to a dismissal or judgment against her. Ms. Coleman cites *Wood v. Allstate Ins. Co.*, 21 F.3d 741, 745 (7th Cir. 1994) for the proposition that "[n]on-cooperation must be material." Again, her citation to specific authority is misplaced. In *Wood*, the Court examined whether an insured complied with the insurance policy contractual obligations requiring cooperation with the insurer. *See id.* at 745. The case did not pertain to the assertion of a Fifth Amendment privilege. Ms. Coleman also states in passing that, presumably the Bankruptcy Court, raised issues *sua sponte*. Petitioner does not state what issues were raised by the Bankruptcy Court on its own, but cites to *dicta* in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) for the proposition that a court must provide a litigant the opportunity to cure the defect. *See* Pet. at 29. The *Celotex* decision explains that a court, without being moved by a party, may only grant summary judgment upon notice to the party. *See id.* at 326, 106 S. Ct. at 2554, 91 L. Ed. 2d at 275-76. The instant case is distinguishable in that there were two motions for summary judgment pending. There was no *sua sponte* decision by the Bankruptcy Court to extinguish Petitioner's claims. With this question, Petitioner fails to present an issue that warrants a granting of her Petition.

4. Petitioner Does Not Present an Issue of Law in Her Question Asking Whether the Lower Courts Need Direction in Applying Law.

In her last effort to grasp the attention of this Court, Petitioner recites one paragraph calling into question the abilities of the lower courts. Ms. Coleman states that she "was denied the due process afforded under the U.S. Constitution as the judiciary system did not apply applicable law in making their determinations, nor did they explain why they deviated from established law." Pet. at 29. Petitioner does not indicate what "applicable law" was not applied. Nor does Ms. Coleman indicate what controlling law was deviated from by the courts below in their rationales. In its simplest form, this question presented by the Petitioner states the basis for her prior appeals and the submission of her petition for writ of certiorari. As there is no legal issue presented, the Respondent simply highlights the lack of support and authority for Petitioner's position.

IV.
CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

DATED: December 14, 2002

Respectfully submitted,

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Supreme Court U.S.
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(3)

No. 02-744

IN THE

Supreme Court of the United States

MONICA LYNN COLEMAN
AND
COLEMAN CRATEN, LLC,
Petitioners

v.

LORI SIMPSON,
Respondent

REPLY BRIEF

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11 U.S.C. § 327(a) 4

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Other References

Fed Rules Dig. Appellate Court
The Supreme Court *Writ of Certiorari, § 3.76* *8*
2 Collier On Bankruptcy, Section 302. 5
House Report No. 95-595, 95th Cong., 1st Sess. 321 (1977) . . . 5
Senate Report No. 95-989, 95th Cong. 2nd Sess. 32 (1978) . . . 5

I. Respondent's Factual Statements Are Inconsistent With The Lower Court Record

Respondent asserts that petitioner included facts not properly before the lower courts, and further asserts that petitioner made misstatements of certain other facts (Opposition Brief (Op.Br.) at p. 2, ¶ 3), but respondent provides no specific evidence to support her allegations which makes it impossible to defend with particularity. Respondent then purports to correct the record with her own Statement of Facts and Statement Of The Case (Op.Br. at p.2-4), which refutes petitioner's Statement Of The Case (Pet. at 9-15). Respondent's statements are inconsistent with the court record, while petitioner's representations are accurately depicted in same as specifically evidenced herein.

A. Respondent's Appointment As Trustee Of Both Estates Is An Unresolved Genuine Issue Of Material Fact In Dispute Properly Raised By Petitioner

Respondent asserts that she was "duly" appointed to serve as the Chapter 7 trustee in both of the above-referenced bankruptcy cases (Op.Br. at p. 3, ¶ 1). However, petitioner's claim had specifically challenged respondent's appointment because respondent had been assigned as trustee of Coleman Craten, LLC by engaging in activities in violation of bankruptcy law and failed to disclose said activities to the court.

1. Respondent Facilitated The Emergency Hearing For Conversion Of The Coleman Craten, LLC Bankruptcy And For Joint Administration ("the Hearing") Using The Hydes As An Instrument.

At the time that respondent was appointed as chapter 7 trustee of petitioner's personal estate on May 11, 1999, she had not yet been assigned to the bankruptcy estate of Coleman Craten, LLC. As respondent points out, joint administration of the estates was the result of the hearing requested by the Hydes, wherein respondent was a witness (Op.Br. at p. 3, ¶ 2), but it was actually the respondent who facilitated the hearing.

a. The Hearing Was Requested By The Hydes *Based* On Information Provided To Them By Respondent

On May 13, 1999, both in testimony and via supporting motion, the Hydes' attorney, Nancy Alquist, Esquire, ("Ms. Alquist"), indicated that her request for an emergency hearing based on "exigent circumstances" was prompted by information provided to her by respondent.

In her affidavit, respondent also acknowledged that participation in the hearing by the Office of the U.S. Trustee was prompted by respondent.

b. The "Exigent Circumstance" Information Presented To The Court Was Information Obtained Through A Search And Seizure Conducted By Respondent Without Notice, Disclosure Or Court Order. Respondent Did Not Inform The Court At The Hearing That She Had Conducted A Search And Seizure, But Merely Stated That She Had Found The Information As A Result Of Performing Her Duty In Collecting The Assets Of The Estate

According to Ms. Alquist's testimony, the hearing based on exigent circumstances was facilitated by information obtained within petitioner's home by respondent. Petitioner's claim asserted that the method respondent used to collect the property; i.e., a search and seizure without court order, was a violation of bankruptcy law and her rights therein. In presenting the "exigent circumstance" evidence to the court, respondent did not disclose to the court that she had searched and seized the property, but merely stated that she obtained the evidence by performing her duty in collecting the assets of the estate.

Pro se petitioner was not provided notice of the hearing, was not in attendance, and motions for postponements so that petitioner could attend, proffered by corporate attorney, were denied. Thus, petitioner was unable to defend statements made by respondent at hearing. Later, it was shown that respondent misrepresented

documents found. For example, a deposit slip found in petitioner's home belonging to the Hydes was presented by respondent as a deposit to an unknown account representing an attempt by petitioner to defraud creditors. Petitioner argued that said representations were a violation of respondent's duties to properly investigate the financial affairs of the debtor prior to taking action (citing *In re Bowman,* 181 B.R. 836, Bkrtcy.D.Md., 1995 and *Bennitt v. Williams*, [1989, CA9 Ca] 892 F.2d 822, 19BCD, 1873, CCH Bankr L.Rptr II 73131)..

c. The Court Ruled That The "Exigent Circumstance" Information Provided Was Insufficient And Inconclusive (Pet. at 23).

d. Court Granted Motions Based On Respondent's Support Of The Conversion and Inaccurate Representation That The Corporation Was A Stockbroker Under The Code.

2. Respondent Failed To Disclose Relevant Material Information To The Courts And To Other Interested Parties In The Estates That Would Have Precluded Joint Administration With One Trustee

a. The Hydes Were Not Creditors Of Petitioner's Personal Estate And Represented An Adverse Interest To The Personal Estate

Respondent now contends that the Hydes were creditors of petitioner's personal estate (Op.Br. at p. 3, ¶2), which is contrary to the lower court record that states:

"The Hydes represented an adverse interest to the personal estate, as they were not creditors of Coleman's personal bankruptcy estate, but were attempting to become creditors through an unadjudicated, disputed issue wherein the Hydes were alleging wrongdoing of the debtor of the personal estate to which the Trustee was assigned while the Debtor was acting as an officer of an affiliate corporation" (Petitioner's Memorandum of Law Supporting Summary Judgment *citing* Adversary Proceeding No. 99-05616 Hyde v. Coleman). **The averments *were undisputed by***

respondent and remained undisputed throughout subsequent appellate proceedings. As Respondent did not deny the averment, and therefore, pursuant to F.R.Civ.P 8(d), it cannot now be disputed.

A trustee is acting outside the scope of her authority, where there is *a potential conflict of interest or the prerception of one*, and the trustee's interest is materially adverse to the estate or the creditors, thereby making it improper and outside her authority for the trustee to pursue such involvement (*In re BH&P, Inc.* 949 F.2d 1300, 21 C.B.C. 2d855 (3rd Cir. 1991). Accord *In re Jack Greenberg, Inc.*, 189 B.R. 906 (Bankr Ed. Pa. 1995). Court records contain statements by major creditors claiming injury caused by respondent's actions.

b. Respondent hired an insider who had represented the Hydes' interests without disclosing the relationship to the court or other interested parties in the estates.

11 U.S.C. § 327 specifically precludes a trustee from hiring someone who has represented a party who has an adverse interest to the estate and requires that a person be "disinterested" (11 U.S.C. § 327(a)). To be disinterested, a person must not be an insider (11 U.S.C. §14(A)); or have represented an adverse interest (and 11 U.S.C. § 14(E)). An insider includes anyone who has been in control of the debtor (11 U.S.C. § 101 (31)(B)(iii)). A trustee is liable if she engages in any formal relationship that would make the trustee an "interested party" (*In re Paolino,* 80 B.R. 342, 345 (Bankr. E.D. Pa. 1987). Mr. Gray was an interested party (Pet. at pp 12-15). Thus, respondent became an interested party when she hired as her agent, Mr. Gray, who was an interested party as defined under bankruptcy law.

3. Petitioner Was Entitled To Summary Judgment Under *Moser v. Darrow*

According to this Honorable Court's ruling in *Moser v. Darrow*, a trustee is liable if she does that which she is not authorized to do under bankruptcy law (*Moser v. Darrow*,

341 U.S. 267, 1951; *See also* Pet. at pp 25-27).

The following facts in the record were undisputed. The Hydes represented an adverse interest. Mr. Gray represented the interests of the Hydes and had control of the debtors. Mr. Gray was an insider who also represented an adverse interest, and therefore, Mr. Gray was an interested party as defined under bankruptcy law. Immediately after meeting with the Hydes, respondent hired Mr Gray, and along with him searched and seized petitioner's home without a court order; contacting the Hydes with what they had found. On the same day, along with the Hydes, respondent and Mr. Gray presented the information found to the court, but failed to disclose the activities and relationships amongst the parties. In fact, not only did the parties not disclose relationships to the court at the hearing, but when they finally filed the *nunc pro tunc* contract hiring Mr. Gray, a month and a half later, the parties, including respondent, denied that Mr. Gray had any relationship with creditors and swore that Mr. Gray was not an interested party.

Rule 2009 prohibits joint administration with a single trustee where there are potential conflicts of interest (U.S. Bankruptcy Rule 2009; *see also* 2 Collier on Bankruptcy, Section 302, "Legislative History to Section 302" *citing* House Report No. 95-595, 95th Cong., 1st Sess. 321 (1977); Senate Report No. 95-989, 95th Cong., 2d Sess. 32 (1978)). The Hydes unadjudicated allegations attempting to become creditor's of the personal estate, by-passed through activities of respondent, represented *at least* a potential conflict of interest to the creditors of the personal estate

Therefore, petitioner argued that respondent would not have been assigned as trustee of Coleman Craten, LLC had she disclosed material information to the court as required under bankruptcy law. Moreover, petitioner argued that undisputed facts entitled petitioner to summary judgment as respondent took actions specifically prohibited under bankruptcy law.

B. Bankruptcy Court Granted Summary Judgment Despite Willful and Deliberate Violations Ruling That A Trustee May Only Be Held Liable For Willful And Intentional "Misconduct".

In the instant case, in making it's deliberation, the bankruptcy court noted how respondent had argued that she was immune from suits for conduct taken in her official capacity [whether or not the action was in violation of statute or case law] (Pet. at 48, ¶1). Respondent further asserted that petitioner lacked evidence, "especially in light of the broad protections afforded to trustees under the law" (Pet. at 48-49). The bankruptcy court agreed, ruling that trustees may only be held liable for willful and intentional "misconduct", and that there is no "misconduct" in the instant case because respondent's activities were done while carrying out her duties (Pet. at 49, ¶1).. This ruling is contrary to this Honorable Court's ruling in Moser, where it was found that trustees are liable for actions taken while carrying out their duty if those actions are forbidden under bankruptcy law (*Id.*). Relying on "broad protection" language, the bankruptcy court expands a trustee's scope of authority beyond that defined under *Moser*. Indeed, the 4th Circuit has shown a willingness to expand a trustee's authority and protection under the "wide discretion" dicta of *Weintraub* (*See U.S. v. Patrick, 916 F.Supp 567 (N.D.W.Va. 1996)).*

Given the bankruptcy court's ruling and other rulings from the 4th circuit, inconsistent with other jurisdictions that result in a change in the standard of immunity for a trustee, it is proper for petitioner to ask this court to review this important federal question.

C. Abandonment Is Not An Issue As Respondent Did Not Raise It In The Lower Court; Respondent Made Statements Showing Abandonment Was Not An Issue: And If Abandonment Is Applicable, Court Erred In Granting Summary Judgment As Abandonment Would Be An Unresolved Genuine Issue Of Material Fact In

Dispute.

Respondent asserts that the property was abandoned (Op.Br. p. 3). Respondent had not raised this issue in the bankruptcy court, but had only begun asserting abandonment in the lower appellate courts, even though in both her affidavit and deposition respondent acknowledged that abandonment was not an issue. Appellate courts ignored this issue in their rulings. Since it was not raised in the bankruptcy court, it cannot now be argued before this Honorable Court (Op.Br. at pp 8-9, No. 3).

Moreover, respondent's own testimony belies abandonment, wherein respondent stated in her affidavit:

"On May 13, 1999, I, together with my counsel and liquidator, WT&P and FCI [Mr. Gray], respectively, went to the Residences for the purpose of (a) inspecting these assets of the Monica Coleman Estate; (b) securing these assets of the Monica Coleman Estate; and commencing the performance of my duties to administer and liquidate these assets. I had brought with me to this inspection of Monica Coleman Estate assets a locksmith for the purpose of gaining access to the Residences and changing the locks so that as Trustee I could properly perform my duty of taking and maintaining custody and control over assets of the Monica Coleman Estate".

In the event that this Court finds abandonment an issue, then the lower court erred in granting summary judgment. Summary judgment is improper if there is a genuine issue of material fact in dispute (*Celotex Corp. v.* Catrett, 477 U.S. 317, 322 (1986)). Though respondent *now* alleges abandonment, there is significant evidence in the lower court record that refutes an assertion abandonment (Pet at. 24). Since respondent had not raised abandonment as an issue, it was never adjudicated before the lower court. Thus, if abandonment is a pivotal issue, and it is not barred because it was not preserved, then summary judgment should not lie as the trier of fact did not determine the issue.

II. Constitutionality May Be Raised As The Matter Had

Been Raised In The Lower Court

Respondent argues that because petitioner had not raised the constitutionality of the Fourth Amendment in respondent's collection of the property, it may not now be reviewed by this Court (Op .Br. pp 5-9). However, it has long been established that "so long as the matter is brought to the attention of the state court, no particular form of words or phrases is required" Federal Rules Digest *citing Green Bay & Miss. Canal Co. v. Pattern Paper Co.* 172 U.S. 58 (1898). While the record must show that an issue under the U.S. Const. *or Code* was necessarily raised before the state court, the modern view is that it is not essential that a specific provision of the Constitution or Code be pointed out, set out verbatum, or cited (Federal Rule Digest 3.76 *citing Bride Prop. v. Hoboken Co.*, 68 U.S. 116 (1863); *Furman v. Nichol* 75 U.S. 44 (1868), *Copperweld Steel Co. v. Industrial* 324 U.S. 780 (1887), respectively).

In petitioner's initial complaint and subsequent filings therein, petitioner had properly argued the matter before the court. Upon filing the adversary proceeding, petitioner stated: "On May 13, 1999, Ms. Simpson [respondent] waited for the Colemans to leave their home. Without notice, disclosure, or a Court Order, Ms. Simpson then broke into the home, searched the premises, changed the locks, and left the Debtor, her husband and their ten-year-old son on the street. Ms. Simpson confiscated all real and personal property, as well as all documents" (Complaint Against Chapter 7 Trustee In Adversary Proceeding, Case. No. 99-5665/99-5667). Additionally, petitioner reiterated her argument in her Motion For Summary Judgment, wherein she specifically used search and seizure language in her argument. Petitioner asserted that said behavior was beyond the respondent's scope of authority under both bankruptcy statute and case law and petitioner continued to argue this matter in the appellate courts.

Therefore, in accordance with the rulings set forth herein, it is proper for petitioner to ask this Court to review

the Constitutionality and the Statutory propriety of respondent's actions.

III. Cases Presented By Petitioner Are Relevant To Questions Asked

Respondent argues that petitioner has presented a "disingenuous" argument filled with irrelevant cases and purports that there are insufficient findings to rise to the level of review by this Honorable Court (Op.Br. pp 9-13). However, in addition to the fact that there are more cases cited than acknowledged by respondent, the cases are relevant and on point. Though addressing other areas as well, the cases rule on trustees' general rights to search and seize, and taken in their entirety, are substantial.

Respondent argues that *Kane v. Smith* (355 P.2d 827 (Wash. 1960)) is irrelevant because it involves a case determining whether a turnover order obtained by a trustee can be enforced in a state court (Op.Br. at p. 11, ¶2). However, as petitioner points out, the case is relevant as it also defines trustee turnover procedures, particularly if a trustee suspects wrongdoing of a debtor. Moreover, the *Kane* court explains the need for court intervention in order to preserve the validity of the turnover procedures in other courts (Pet. at 17, ¶3). Thus, not only is it relevant to the instant case because respondent did not follow the procedures, it is also relevant because the standard of showing exigent circumstances by clear and convincing evidence required under the *Kane* ruling would not have been met, as on the same day as the seizure, the bankruptcy court ruled that there was insufficient and unconvincing evidence presented to support exigent circumstances (Pet at 23).

Likewise, in both U.S. v. Masterson and Applicatiojn of Trustee In Bankr. For Search Warrant, without distinguishing between corporate or personal debtors, the courts define the general rights of search and seizure activities performed by trustees within their circuits (Pet. at 15-25). And in *Masterson*, the court's analysis with

trespass and rights akin to private citizens *is* directly inconsistent with this Honorable Court's ruling in *Bivens v. Six Unknown Named Agents* (Id.). In *U.S. v Patrick*, a 4th Circuit case, the rationalle used by the court, again relying on the wide discretion dicta of *Weintraub*, clearly could be interpreted to include activities involving individuals as well as corporations (*U.S. v. Patrick*, 916, 570, 571 F. Supp. 567 (N.D.W.Va. 1996). The rulings by the courts in the present case support that the Patrick court intended to include individuals in it's interpretation of an expansion of power to trustees on a "wide discretion" basis.

IV. Summary Judgment Is Not Proper Where There is A Genuine Issue of Material Fact Whether Petitioner Had Complied With Discovery.

Respondent argues that *Wood v. Allstate Ins. Co.*, 21 F.3d 741, 745 (7th Cir. 1994) is not relevant as it involves insurance claims (Op.Br. at 18, ¶2). The *Wood* relevance is clarified in *Powell v. U.S. Fidelity and Guar. Co.*, 855 F.Supp. 858 (E.D.Va. 1994). Citing *Wood,* The *Powell* court explains that in civil suits, such as the instant case, when there is a genuine issue of material fact concerning compliance with discovery, summary judgment should be denied [to respondent] (*Id. at* 861). In the instant case, respondent's violations of bankruptcy law were clearly reflected within the court records. There was no other evidence required. Petitioner's testimony was not material as petitioner was not aware of respondents actions and did not participate therein. Petitioner had raised this material dispute regarding her compliance with discovery before the bankruptcy court. And at the time of the ruling, the court had not resolved the dispute. Therefore, petitioner's testimony is not material, and in accordance with the ruling in *Powell* and *Wood,* respondent should not have been granted summary judgment.

Conclusion

Petitioner prays that this Honorable Court will accept the Petition for Writ of Certiorari.